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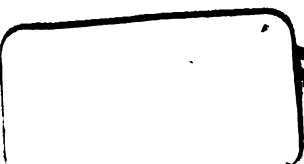
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MASSACHUSETTS REPORTS  
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CASES ARGUED AND DETERMINED

MASSACHUSETTS IN THE  
SUPREME JUDICIAL COURT  
OF  
MASSACHUSETTS

JANUARY 1904 — MAY 1904

HENRY WALTON SWIFT  
REPORTER

BOSTON  
LITTLE, BROWN, AND COMPANY  
1904

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*Rec. Dec. 30, 1904.*  
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**JUSTICES**  
**OF THE**  
**SUPREME JUDICIAL COURT**

**DURING THE TIME OF THESE REPORTS.**

**HON. MARCUS PERRIN KNOWLTON, CHIEF JUSTICE.**

**HON. JAMES MADISON MORTON.**

**HON. JOHN LATHROP.**

**HON. JAMES MADISON BARKER.**

**HON. JOHN WILKES HAMMOND.**

**HON. WILLIAM CALEB LORING.**

**HON. HENRY KING BRALEY.**

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**ATTORNEY GENERAL.**

**HON. HERBERT PARKER.**



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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME JUDICIAL COURT  
OF  
MASSACHUSETTS.

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COMMONWEALTH vs. JAMES McGRATH.

Norfolk. November 16, 1903. — January 7, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Intoxicating Liquors. Cider.*

By R. L. c. 100, § 2, cider is an intoxicating liquor within the meaning of that chapter without being shown to contain more than one per cent of alcohol.

On the trial of a complaint under R. L. c. 100, §§ 1, 2, for maintaining a certain tenement for the illegal sale and illegal keeping of intoxicating liquors, there was evidence that the defendant kept a grocery and had sold cider there without a license during the time covered by the complaint. The judge instructed the jury, that if they found this to be the fact the defendant would be guilty of the offence charged, "as the sale of all cider, unless under a license, is prohibited by law in this Commonwealth." *Held*, that the first part of the instruction was correct, and that the reason given in the portion quoted, although stated too broadly, did the defendant no harm, as he did not come within the valid exceptions of R. L. c. 100, § 1. St. 1903, c. 460, was not then in force.

LATHROP, J. This is a complaint charging the defendant with keeping and maintaining, on March 23, 1903, and during the preceding six months, a certain tenement in Hyde Park, by him used for the illegal sale and illegal keeping for sale of intoxicating liquors.

The following facts appeared in evidence at the trial in the  
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Superior Court. The defendant kept a grocery in Hyde Park, selling the usual goods dealt in by grocers. In October, 1902, he bought fifty barrels of windfall apples, some of which he sold, and the remainder of which he had made into cider, and obtained therefrom eight barrels of cider. He sold one barrel to a neighbor, and also sold two and a half barrels in his shop, by the quart and gallon, the cider so sold being taken from the premises and not drunk thereon. Shortly before January 1, 1903, he noticed that "the cider did not taste as sweet as it did," and sold no more from that time on. The four and a half barrels remaining were seized upon a search warrant on March 15, 1903.

On the evidence the judge ruled as follows: "If the jury find that the defendant, during the time covered by the complaint, sold cider or kept it for sale upon his premises, he would be guilty of the offence charged, as the sale of all cider, unless under a license, is prohibited by law in this Commonwealth." The jury returned a verdict of guilty, and the case is before us on the defendant's exception to the above ruling.

It is to be noticed in the first place that the defendant did not justify the sales made by him as being under a license, and that the St. of 1903, c. 460, which took effect on June 23, 1903, has no application because the statute was passed after his conviction. The case is to be determined upon the construction to be given to the provisions of the R. L. c. 100, §§ 1, 2.

Section 1 begins as follows: "No person shall sell, or expose or keep for sale, spirituous or intoxicating liquor, except as authorized in this chapter." Then follow certain exceptions, one of which, if it applied to the defendant, was declared to be unconstitutional in *Commonwealth v. Petranich*, 183 Mass. 217.

Section 2 reads as follows: "Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than one per cent of alcohol, by volume, at sixty degrees Fahrenheit, and distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter."

The question on this part of the case is whether the provision of the section as to the percentage of alcohol applies to cider.

The St. of 1875, c. 99, § 18, provides: "The terms intoxicating liquor, or liquors, in this act shall be construed to include

ale, porter, strong beer, lager beer, cider, and all wines, as well as distilled spirits." This was amended by the St. of 1880, c. 239, § 5, by adding the following words at the end of the section above cited: "any beverage containing more than three per cent of alcohol, by volume, at sixty degrees Fahrenheit, shall be deemed to be an intoxicating liquor within the meaning of this act." So it is declared in the Pub. Sts. c. 100, § 27: "Ale, porter, strong beer, lager beer, cider, all wines, and any beverage containing more than three per cent of alcohol, by volume, at sixty degrees Fahrenheit, as well as distilled spirits, shall be deemed to be intoxicating liquor within the meaning of this chapter." The St. of 1888, c. 219, § 1, amended the section just cited by striking out the word "three" and inserting the word "one."

It was held in *Commonwealth v. Snow*, 133 Mass. 575, under the St. of 1875 above cited, that on a complaint for unlawfully keeping intoxicating liquor with intent unlawfully to sell the same, where the proof was of a sale of lager beer, the question whether it was kept for sale not being contested, the government need not prove that it contained more than three per cent of alcohol. So, under the Public Statutes as amended by the St. of 1888, it was held that it was not necessary to prove that cider contained more than one per cent of alcohol. *Commonwealth v. Brothers*, 158 Mass. 200, 206.

While the phraseology in the Revised Laws is slightly changed from that in the Public Statutes, as amended by the St. of 1888, there is no change in the law. The first part of the ruling was therefore right.

The second part of the ruling, in which the judge gave the reason for the ruling, was stated too broadly, but the defendant was not prejudiced thereby, for, so far as he was concerned, the ruling was right, as he did not come within any of the valid exceptions in § 1.

*Exceptions overruled.*

*T. E. Grover & D. W. Murray*, for the defendant.

*Asa P. French*, District Attorney, & *R. W. Nutter*, Assistant District Attorney, for the Commonwealth.

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**EAST TENNESSEE LAND COMPANY vs. JOSEPH R. LEESON.**  
**SAME vs. JOHN HOPEWELL, JR.**

Suffolk. December 8, 1903. — January 7, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Equity Pleading and Practice, Decree. Interest.*

A sum of money ordered by a decree in equity to be paid as damages bears interest from the date of the decree although the amount in part is made up of interest. A decree in equity will not be set aside for a defect in form in not stating the amount of the costs.

TWO BILLS IN EQUITY, filed May 31, 1895, to recover alleged secret profits of the defendants as promoters and directors of the plaintiff, a corporation organized under the laws of the State of Tennessee, before this court at previous stages as reported in 176 Mass. 310, 178 Mass. 206, and 183 Mass. 37.

At its present stage the case came up by appeals of the two defendants from final decrees of the Superior Court, each of which was as follows: "This cause came on to be further heard at this sitting after rescript of the Supreme Judicial Court affirming the decree of this court herein; and thereupon, and in accordance with said rescript, counsel for the defendant being present, it is ordered, adjudged and decreed that the decree heretofore entered herein be affirmed and that the defendant pay the plaintiff the sum of \$38,339.25 damages, with \$200 costs of suit as taxed to the date of said decree as fixed by said decree, together with the plaintiff's further costs upon this appeal to be taxed by the clerk, together with interest on said decree from the date thereof, and that execution may issue therefor. By the Court, Henry E. Bellew, Assistant Clerk, March 5, 1903."

*G. F. Ordway, (I. R. Clark with him,) for the defendants.*

*W. H. Russell, (of New York,) for the plaintiff.*

LORING, J. This is a frivolous appeal.

1. By R. L. c. 177, § 8, a judgment bears interest from its date although the amount of the judgment in part is made up of interest. The same rule applies to a decree in equity.

2. The filing of the intervening petition by the receiver did not prevent the entry of a final decree. By taking a final decree in these suits the receiver, who is prosecuting them in the name of the East Tennessee Land Company abandoned his intervening petition. He had a right to do so. The cases cited by the appellant as to when a case is ripe for judgment under a rule of court allowing judgment to be entered up as of course have nothing to do with this case.

3. The restraining orders printed as part of the record in these suits did not prevent the entry of a final decree. These orders recite that the two suits now before us are pending, and that decrees for the payment of \$38,339.25 have been entered in each of them in favor of the plaintiff, from which decrees appeals have been taken; they then recite that "the proceeds of said decrees, if the same are affirmed, will be a fund out of which the several plaintiffs herein claim that their demands against said East Tennessee Land Company should be paid," and that the "parties plaintiff in these suits, and the said East Tennessee Land Company and its receiver, desire the immediate collection of said decrees, if they be affirmed"; and thereupon it is ordered that no compromise of the suits now before us shall be made without the authority of the court entering the restraining order, and "if said decrees be affirmed by the said Supreme Judicial Court as against said Leeson and Hopewell for the said sums or for any sums, and if execution shall be awarded upon said decrees, then, in the event of the payment of said amounts by the said Leeson or the said Hopewell, either with or without execution, the same shall be collected by and paid into the hands of Henry E. Bellew, one of the assistant clerks of this court, as receiver of said funds."

It is manifest that the order was made in another suit or in other suits, and was filed in this suit by mistake or to charge the plaintiff with notice that this order had been made in the other suit. It was not the determination of any issue raised in these suits.

4. It is true that the restraining order is not well drawn. It provides that in case the decrees are affirmed and execution issues, then in the event of payment with or without execution, the same shall be collected by the receiver. If there is any doubt whether under that order payment can be made without execu-

tion being taken out, or if there is any doubt whether payment can be made in accordance with the execution to the plaintiff in these suits, the remedy of the defendants is to apply in those suits for a modification of the restraining order. The final decree entered in the suits now before us disposed of all issues raised by the plaintiff or defendants not abandoned by them.

5. As matter of form the amount of costs should have been stated in the decree. But the decree will not be set aside for a mere matter of form.

The entry must be

*Decree affirmed with double costs and interest at the rate of twelve per cent per annum, from the date when the appeal now before this court was taken.*

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GEORGE F. WENTWORTH & another vs. MARY C. EICHORN  
& another.

Suffolk. December 8, 1903. — January 7, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Deed, Delivery. Equity Jurisdiction.*

In a suit in equity seeking the cancellation of a deed of release of restrictions on the lots of land shown on a certain plan, where the bill alleged, that the deed by its terms was not to take effect until executed by all the grantors, and that the defendant being one of the persons named as grantors did not execute the deed, having signed it but failed to deliver it to the plaintiffs or to record it, the defendant alleged in his answer "that the said deed was executed by all the parties named as grantors." *Held*, that this was an allegation that the defendant had delivered the deed.

In a suit in equity seeking the cancellation of a deed of release of restrictions on the lots of land shown on a certain plan, where the bill alleged, that the deed by its terms was not to take effect until signed by all the grantors, and that the defendant, being the owner of one of the lots, signed the deed but did not deliver it to the plaintiff, the owner of another of the lots, and did not record it, a finding that the defendant signed the deed but did not deliver it to the plaintiff and did not record it, but retained it in his custody refusing to record it, is not a finding that the deed was not delivered by the defendant, the owners of many lots being parties to the deed and each of them being a grantor and a grantee. If on such a state of facts the plaintiff has a remedy, it is founded on a right as one of the grantees to have the deed recorded.

LOBING, J. This case comes up on appeal by the plaintiffs from a final decree dismissing the bill. The evidence on which that decree was made is not before us. The final decree states that the following facts were found by the court. The plaintiffs since 1896 have been the owners of a lot of land on Pine Street and Broadway Extension in Boston, numbered 8 on a plan recorded in Suffolk Deeds, Libro 471, folio 282; that said lot together with all other lots shown on said plan was subjected to certain restrictions by a deed from Bass to Brooks in July, 1841. That the defendant Eichorn has been since July, 1896 the owner of another of said lots. That between January 1, 1897, and September 1, 1898, the deed releasing the restrictions on said lots was signed by the owners of all said lots including the defendant Eichorn; and that "on or about the latter date the defendant Eichorn signed the said release but did not deliver the same to these plaintiffs or record the same, and there was no fraud or mistake in obtaining the signatures to the instrument."

The plaintiffs alleged in their bill of complaint that they executed the deed of release on September 1, 1898, and delivered it to one Joy, and that the delivery by them of said deed to Joy "was not an absolute delivery intended to pass any title, but was only a conditional delivery for the purpose of having the deed of release executed by the persons whose signatures were necessary thereto in order to completely remove the said restrictions, and it was understood and intended by the plaintiffs that if the said deed was not so executed within a reasonable time, . . . this conditional delivery was to be void and of no effect." The decree states that there was no evidence to sustain the allegation as to the conditional delivery except the language of the release.

The plaintiffs also alleged that the defendant Eichorn "by retaining the said deed under her control and refusing to allow it to be recorded or to deliver it to the plaintiffs, has refused to become a party to the said deed"; that as said Eichorn has not executed the deed the purpose for which the plaintiffs delivered said deed to Joy has not been accomplished, and the delivery is void; that the plaintiffs' conditional delivery was an offer, that this offer has not been accepted by Eichorn and the plaintiffs

have revoked their said offer; and that the defendant Eichorn has it in her power to disregard this revocation by recording the deed. The decree states that there was no evidence to sustain these allegations "other than the admitted fact that Mrs. Eichorn had signed the deed of release and had retained it in her custody, refusing to record the same."

The plaintiffs also alleged that one Wilson has been since October, 1900, the owner of lot 13 on said plan; that he is a necessary party to the deed, and has never executed the same.

The relief asked for in the bill was that the deed might be brought into court and the plaintiffs "allowed to cut out or obliterate their signatures thereto affixed," and that the defendant Eichorn might be "required to produce the said deed of release and to surrender the same to be cancelled under the order of this court."

After a statement of these findings of fact and of a finding to the effect that the predecessor in title of the lot now owned by Wilson "had properly signed and delivered the deed of release," the decree is as follows: "It not appearing upon the facts in evidence, aside from such adjudication, that the plaintiffs are entitled to the relief prayed for, and the allegations in the bill of complaint not having been sustained, thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the plaintiffs' bill be dismissed with costs to the defendant Mary C. Eichorn, and also to the other defendants who appeared in this action, to be taxed by the clerk, and executions issue therefor."

The decree also refers to a former suit between the same parties which "was opposed as a bar," but it is further stated in the decree that "the findings in this case and this decree are not based on the adjudication" in that suit. It is alleged in the bill and admitted in the answer that it was adjudged in the other suit that the defendant Eichorn was not bound by an agreement on which the plaintiffs relied as showing that their execution of the deed releasing the restrictions was conditional. Beyond this allegation in the bill not admitted in the answer, the character of the former suit between the parties does not appear.

The plaintiffs' argument is that on the face of the deed of release the deed is not to take effect until executed by all, and that it is found that it has not been executed by Mrs. Eichorn. They

rest their contention that it has not been executed by Mrs. Eichorn on two findings, namely, that she "signed the said release but did not deliver the same to these plaintiffs or record the same," and that "Mrs. Eichorn had signed the deed of release and had retained it in her custody, refusing to record the same." But the defendant Eichorn in her answer alleges "that the said deed was executed by all the parties named as grantors." That is an allegation that she has delivered it. The finding that she has not delivered the deed to the plaintiffs, who are two of a large number, each of whom is grantor and grantee, is not a finding that the deed has not been delivered. As to the other finding, all that appears is a statement in the decree that there was no evidence upon the point "other than the admitted fact that Mrs. Eichorn had signed the deed of release and had retained it in her custody, refusing to record the same." If that is a finding at all, it is not a finding that the deed has not been delivered by Mrs. Eichorn.

So far as the Wilson lot is concerned, it is found that "between January 1, 1897, and September 1, 1898, the said deed of release of the restrictions upon the said lots was signed by the plaintiffs as well as other owners of the said lots," and it was not until 1900 that it was conveyed to Wilson by his "predecessor in title," who "had properly signed and delivered the deed of release." Whether Wilson did or did not take with notice of the release does not appear. If by the failure to have the deed recorded between September, 1898, and 1900, Wilson has taken lot 13 without notice of the release of the restrictions, that fact does not entitle the plaintiffs to have their signatures to the release cancelled.

The plaintiffs have mistaken their remedy. If they have a remedy it is on the ground that as each party to the deed of release is a grantee as well as a grantor, the deed of release is as much theirs as Mrs. Eichorn's, and for that reason they have a right to have it recorded. Upon that question we do not express a final opinion, as it is not before us.

*Decree affirmed.*

*C. E. Wentworth*, for the plaintiffs.

*T. E. Grover*, (*F. Joy* with him,) for the defendant Mary C. Eichorn.



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# HENRY H. SPRAGUE & others vs. JAMES DORR.

Suffolk. December 9, 1903. — January 7, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Constitutional Law. Watercourse. Metropolitan Water Supply.*

Special and general statutes, preventing the discharge into streams of polluting matter of such kind and amount as will corrupt or impair the quality of the water, are reasonable regulations of the exercise of private rights of property, and need not provide for compensation to persons having the ordinary rights of riparian owners.

The owner of land through which runs a stream whose waters are taken under St. 1895, c. 488, to be used as a part of the metropolitan water supply, is subject in his use of the stream to regulations made by the State board of health under § 24 of that statute, and such regulations may be enforced against him by the metropolitan water board under §§ 27, 28 of the same statute.

If the owner of land through which runs a stream whose waters are taken under St. 1895, c. 488, to be used as a part of the metropolitan water supply, has acquired by prescription a right to pollute the stream, such right is included in the taking, and the owner is entitled to compensation for it under § 12 of the statute, as a damage sustained "by the interference with the use of any water, or by any other act or thing done by said board under this act."

*Whether*, in the exercise of the police power, the Legislature, without providing compensation, can forbid the pollution of water by one who has acquired a prescriptive right to pollute it as against other proprietors, *quere*.

BILL IN EQUITY, filed December 4, 1902, and amended June 10, 1903, by the members of the metropolitan water and sewerage board, under St. 1895, c. 488, § 28, to restrain the defendant from polluting the waters of the Quinepoxet River in the town of Holden, as stated in the opinion.

In the Superior Court the case was heard by *Hardy, J.*, who ruled, as matter of law, that the plaintiffs were entitled to the relief sought, and ordered that an injunction should issue as prayed for in the amended bill. At the request of the parties, he reported the questions raised for determination by this court, such decree to be entered as this court should deem proper.

*R. A. Stewart*, Assistant Attorney General, for the plaintiffs.

*B. B. Jones & C. C. Milton*, for the defendant.

KNOWLTON, C. J. This is a bill in equity brought by the members of the metropolitan water board to obtain an injunction against the discharge by the defendant of human excrement

and the contents of water closets and privies into Quinepoxet River, a stream flowing through the defendant's premises in the town of Holden, and forming one of the tributaries of the south branch of the Nashua River, a source of water supply for the cities, towns and water companies named in St. 1895, c. 488. The bill is brought under §§ 27 and 28 of this statute, to enforce rules and regulations made by the State board of health under the authority of § 24. The defendant is the owner of a manufacturing establishment on this river, and he admits that, in violation of these rules and regulations, he is maintaining privies whose contents are discharged directly into the stream. The plaintiffs, seeking to apply the principles on which the St. 1902, c. 535, is founded, offered "to pay the entire expense of constructing water closets and privies at such point or points upon the defendant's premises as they claim will reasonably accommodate the defendant's employees, and at the same time prevent the discharge of human excrement and the contents of privies and urinals into the waters of said Quinepoxet River," but the defendant refused to allow this, contending that it would seriously interfere with his business and property. No question is made as to the reasonableness or validity of the rules and regulations, except that they are in "conflict with the defendant's rights of property." See *Brodvine v. Revere*, 182 Mass. 598.

The statute (§ 24) authorizes the making of "rules and regulations for the sanitary protection of all waters used by the metropolitan water board for the water supply of any city, town or water company," etc. That the exercise of such authority by the Legislature is within the police power as it is generally defined by the courts, and within the particular provisions of c. 1, § 1, art. 4, of the Constitution of Massachusetts, is too plain for discussion. It may involve a regulation and modification of a use of streams which otherwise might be made under the common law rights of riparian proprietors. These rights include every reasonable kind of use of the water as it passes by, having a proper regard for the rights of other proprietors on the stream below. It has often been said that riparian proprietors have no right to pollute the waters of a stream. In thinly settled and remote regions, upon streams whose waters are not appropriated to domestic use, impurities may sometimes be discharged into

the water without interfering with any use of it that other riparian proprietors desire to make; but when the water is to be used for drinking, as the waters of most streams may be used and of many streams are in fact used, the uses of riparian proprietors must be limited with a strict regard to cleanliness and sanitation. Hence statutes special and general have been passed from time to time, touching this subject. St. 1878, c. 183. R. L. c. 75, § 124. These laws, so far as they merely prevent the discharge into streams of polluting matter of such kind and amount as will corrupt or impair the quality of the water, are a reasonable regulation of the exercise of private rights of property in reference to the common good, and they are not an interference with property that calls for compensation to the owners.

As the water flowing through the defendant's premises is used as a part of the metropolitan water supply for numerous cities and towns, these rules and regulations control the exercise of the defendant's ordinary rights as a riparian proprietor, and are binding upon him without any taking of his property or provision for compensation. *Newton v. Joyce*, 166 Mass. 83 and cases there cited.

The defendant contends and the plaintiffs deny that he has acquired by prescription a right to discharge these impurities into the stream. We need not decide the question thus raised, for if he has acquired by prescription a right of property in the stream which he would not otherwise have, this right to pollute the stream is taken away by the statute and the action of the board in taking the waters. For damages to his property he is entitled to compensation under § 12 of the act. Damages "in property," are given whether they are sustained by a taking of property "or by the interference with the use of any water, or by any other act or thing done by said board under this act."

The metropolitan water board, under date of February 23, 1898, took all the waters that flow through the defendant's premises, "for the purpose of diverting the same for the uses of said act at or near said line of taking, and not elsewhere." The line of taking is on the stream at a considerable distance below the defendant's premises. A copy of this taking was filed in the registry of deeds in accordance with the statute, and all the other requirements of the act affecting the legality of the taking were

duly complied with. The defendant contends that this taking was not sufficiently broad or definite in its description to include his prescriptive right. We are of opinion that this contention is not well founded. All the waters were taken to be diverted at a point below for use under the act. The Pub. Sta. c. 80, § 96 (R. L. c. 75, § 124) was then in force, under which the discharge of polluting matter into waters so used was forbidden. Under St. 1895, c. 488, § 30, in the absence of rules and regulations of the board of health, this general law applied to these waters as soon as they were taken; for it is not contended that prescriptive rights had been acquired by the defendant previously to July 1, 1878, the date of the enactment of the general law. Moreover, the statute authorizing the taking also authorized the making of rules and regulations for the sanitary protection of the waters. The act of taking, without express mention of any prescriptive right to pollute the waters, necessarily deprived the defendant of this right, if he had it, and brought him within the provision for compensation.

As a riparian proprietor without other rights, the rules and regulations are binding upon him, and if he has a prescriptive right to pollute the water, they are still binding and must be enforced; for he is entitled to compensation for the loss of such a right.

Whether in the exercise of the police power for the preservation of the public health, the Legislature, without providing compensation, might forbid the pollution of water by one who has acquired a prescriptive right to pollute it as against other proprietors, we need not decide.

*Decree for the plaintiffs.*

CHARLES H. PARKER & another, trustees, *vs.* ARTHUR  
D. HILL.

Middlesex. December 15, 1903. — January 7, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Trust, Compensation of trustee.*

In this Commonwealth there is no rule of law that trustees are to receive a commission of five per cent on all income received and paid out. Under our statutes the only rule of law is that a trustee is to receive a just and reasonable compensation for all services performed in the execution of his trust.

Where in passing upon a trustee's account the Probate Court has made an allowance for services in the form of a commission upon income received and paid out, and it appears that the allowance was made as a proper compensation for all the services of the trustee during the period covered by the account, no additional allowance should be made to the trustee as compensation for having received and reinvested as capital money from the sale of rights to subscribe to new shares of a corporation and from dividends issued by a land company as payments from its capital.

APPEAL, from a decree of the Probate Court for the County of Middlesex, disallowing two items in an account of the petitioners as trustees under the will of Eliza I. Greenough. Petition in the Probate Court filed December 17, 1902.

On appeal the case came on to be heard before *Braley, J.*, who, at the request of the parties, reserved it upon the record of the Probate Court, the objections to the decree, and an agreed statement of facts, for the consideration of the full court, such order to be made therein as justice and equity might require.

The items disallowed were dated January 31, 1902, and were under the heading "Changes in Investments since last Account." One was a charge of a commission of five per cent on a sum received from the sale of rights to subscribe to new shares to be issued by the American Telephone and Telegraph Company, and the other was the charge of a like commission on dividends made by the Boston and Roxbury Mill Corporation, whose entire assets consist of real estate and whose dividends are treated on the books of the corporation as dividends of capital.

*H. J. Coolidge*, (*A. P. Loring* with him,) for the appellants.

*A. D. Hill*, *pro se*, was not called upon.

KNOWLTON, C. J. The appellants are trustees under a will, and they appeal from a disallowance by the Probate Court of two items in their account, in each of which they ask to be allowed a commission of five per cent on the proceeds of certain property which belonged to the capital of the fund in their hands, and which they turned into money and held for reinvestment.

The law relating to the compensation of trustees differs greatly in different places. In England the rule has been that they should be allowed no compensation for the performance of their official duties. In some of the American States statutes have been passed providing for the allowance of commissions at graduated rates on the sums received and paid out. In this Commonwealth "An executor, administrator, guardian or trustee shall be allowed his reasonable expenses incurred in the execution of his trust, and shall have such compensation for his services as the court in which his accounts are settled may allow." R. L. c. 150, § 14. In Pub. Sts. c. 144, § 7, from which this section was taken, in the place of the last word "allow," were the words "deem just and reasonable." This change of language does not change the meaning of the section or the principles on which allowances are to be made. It is compensation that is to be allowed, and the amount should be neither more nor less than is just and reasonable.

This case has been argued by the appellant as if it were a rule of law that trustees are to be allowed a commission of five per cent on all income received and paid out; and the burden of the argument is that this rule should be extended to sums received from capital and reinvested. There is no such rule of law in Massachusetts. The only rule of law is that a trustee is to receive a just and reasonable compensation for all services performed in the execution of his trust. Under the statute there can be no such rule of law applicable alike to cases in which the amount of service rendered is necessarily large and to cases in which the service rendered is very small in proportion to the amounts received and paid. The meaning of the statute is that the compensation is to be just and reasonable in each case, considered by itself alone. In respect to the amount and value of the services, cases differ otherwise than in the amounts of the

receipts and disbursements. In the cases in which the allowance of an amount expressed in the form of a commission of five per cent has been approved by this court, the decision has been only that the amount was reasonable upon the facts shown in the particular case, not that this amount would be reasonable in all cases, or as a rule to be followed in cases generally. In *May v. May*, 109 Mass. 252, 258, in which the court disallowed compensation expressed in the form of a commission for moneys received and paid out in changing investments, the court said, "The true principle would be, adequate reward according to the circumstances of the case. *Post v. Jones*, 19 How. 150. We should however be very unwilling to sanction the practice of putting that compensation in the form of a commission upon the amount expended or reinvested, and therefore we cannot allow these charges in their present form." In *Blake v. Pegram*, 101 Mass. 592, 600, in which sundry charges for commissions were disallowed, the true principle was stated by Mr. Justice Wells as follows: "Such a commission upon income received and paid over is allowable only as a convenient measure of compensation for services supposed to have been actually rendered. It implies something more than mere nominal service and the responsibility of the trust. There is no rule of law and no principle of right by which such commissions are to be charged or allowed without regard to the rendition of actual services therefor."

It is often difficult to measure the compensation which should be allowed for the services of a trustee in the care and management of an estate. The amount of property in his charge and the amount of income received from it are to be taken into account in determining at what rate he shall be compensated for the care and thought and intelligence, as well as the manual service, which are given to the performance of his duties. When the value of these, considered in relation to the trustee who has been the actor and to the beneficiary who has been the recipient, is ascertained, it may sometimes be expressed conveniently in the form of a percentage on the amounts received and disbursed. Many cases may be so similar in all the elements to be considered in determining what amount of compensation is reasonable that they may be grouped in a class, and in each case the same per-

centage of the income received and paid over may properly represent the compensation to be allowed for all the services rendered. Undoubtedly there are other cases in which a compensation determined according to a percentage allowed in cases belonging to a common class, without reference to other considerations, would be too high, and others in which it would be too low. In some cases there would be special services of a peculiar kind whose value could easily be fixed according to usual standards. Everything that a trustee does rightly and properly is to be paid for, and nothing is to be given as a commission except for services actually rendered, and as a measure of reasonable compensation for the service.

The claims for commissions for changing investments were rightly disallowed in this case. But this service was to be paid for as well as any other service. Occasional changes of investments are a part of the ordinary services of trustees, and are similar to services commonly rendered by trustees in watching their investments to see whether any action should be taken in regard to them.

We find in this account allowances for services in the form of commissions upon income received and paid. We infer from the record and the argument that these allowances were made as a proper measure of compensation for all the services of the trustees during the period covered by the account. If this inference is correct, no specific allowance should be made for the changes in the investments. If this is a mistake, and if the allowances made in other parts of the account do not fairly compensate the trustees for all their services, their compensation should be increased so as to make it just and reasonable.

The decree of the Probate Court will be affirmed unless within ten days after this decision an application is made by the trustees that the account be opened as to their compensation for all services. If such an application is made, the case will stand for a further hearing in the Probate Court.

*So ordered.*



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189	601
185	18
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**JOHN P. SQUIRE AND COMPANY vs. JOSEPH O. TELLIER  
& others.**

Suffolk. December 15, 16, 1903. — January 7, 1904.

**Present:** KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Constitutional Law*, Police power, reasonable regulation. *Sales of Merchandise in Bulk*.

St. 1903, c. 415, providing that sales of merchandise in bulk, not made in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against creditors of the seller, unless certain requirements for the information and protection of creditors are complied with, is constitutional.

**BILL IN EQUITY**, filed August 13, and amended October 20, 1903, by John P. Squire and Company, a corporation organized under the laws of New Jersey, to reach and apply, in satisfaction of a debt from the defendants Tellier and Chausse to the plaintiff, a stock of merchandise alleged to have been sold by the defendants Tellier and Chausse to the defendant Hudon without compliance with the provisions of St. 1903, c. 415.

The defendant Hudon demurred to the amended bill on the ground that the statute named is unconstitutional. In the Superior Court *Sheldon*, J. overruled the demurrer, and, at the request of the parties, being of opinion that the question raised so affected the merits of the controversy that before further proceedings the matter ought to be determined by this court, reported the case for such determination. If the demurrer was sustained, the bill was to be dismissed; otherwise the defendant Hudon was to file an answer.

*M. S. Holbrook*, for the plaintiff.

*A. W. Putnam*, (*H. A. Richardson* with him,) for the defendant Hudon.

*A. E. Pillsbury & W. M. Morgan*, for the Boston Credit Men's Association, by leave of court, filed a brief in support of the constitutionality of the statute.

KNOWLTON, C. J. The only question for our consideration on the demurrer to this bill is whether the St. 1903, c. 415, is

constitutional. The first section of this statute is as follows: "The sale in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser, at least five days before the sale, make a full, detailed inventory, showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale; and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller, under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, of the proposed sale and of the price, terms and conditions thereof." The second section exempts from the provisions of the act, sales by executors, administrators, receivers, assignees for the benefit of creditors, trustees in bankruptcy and public officers acting under judicial process. This is a pretty stringent regulation of a certain class of sales. The purpose of the Legislature evidently was to provide for creditors protection against a class of sales which are frequently fraudulent, and which leave creditors with no means of collecting that which they ought to receive. The statute deals only with sales in bulk of a part or the whole of a stock of merchandise, which are not made in the ordinary course of trade and in the regular and usual prosecution of the seller's business. It does not interfere with the transaction of ordinary business, but relates to unusual and extraordinary transfers. In substance, it declares that a sale of this kind shall not be made without first giving to creditors an opportunity to collect their debts, so far as the property to be sold might enable them to collect, or subsequently making satisfactory provision for the payment of these debts. A sale made in violation of the statute is void only as against creditors, and, if the vendor's debts are paid, the sale cannot be interfered with. A purchaser, to be

safe, has only to see that the vendor's creditors are provided for. The vendor may sell freely, without regard to the statute, if he pays his debts. The Legislature, when contemplating this legislation, had occasion to consider and balance against each other the general right of property owners to make contracts and dispose of their property, and the general right of creditors to be paid, and to have reasonable opportunities secured to them for the collection of their debts. That this is within a class of legislation for which there is constitutional authority is too plain for question. The object of it is like that of our numerous statutory provisions which authorize attachments on mesne process, and establish courts with all the necessary machinery for the collection of debts. The statute requires of the vendor nothing that cannot be done with reasonable effort. If he is unable or unwilling to pay his debts, it puts a substantial obstacle in his way when he wants to dispose of his stock of merchandise in bulk and to receive payment for himself. But, under such circumstances, the property in most cases ought not to be sold in bulk without first giving creditors an opportunity to consider what ought to be done with it.

The Legislature undoubtedly assumed to act under what is termed broadly the police power, and more specifically to act under the authority directly conferred by c. 1, § 1, art. 4 of the Constitution of Massachusetts, which permits them "to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances . . . as they shall judge to be for the good and welfare of this commonwealth," etc. Their power to regulate and limit the making of contracts and the use and disposition of property is very broad. This is illustrated by the statutes found in Titles XII. and XIII. of our Revised Laws, comprising chapters from fifty-six to seventy-four, inclusive. This power is recognized in many decisions of the courts. *Commonwealth v. Blackington*, 24 Pick. 352. *Blair v. Forehand*, 100 Mass. 136, 139. *Watertown v. Mayo*, 109 Mass. 315. *Commonwealth v. Crowell*, 156 Mass. 215. *Commonwealth v. Huntley*, 156 Mass. 236. *Commonwealth v. Gilbert*, 160 Mass. 157, 160. *Opinion of the Justices*, 163 Mass. 589. *Newton v. Joyce*, 166 Mass. 83. *Commonwealth v. Nutting*, 175 Mass. 154. *Slaughter-House cases*, 16 Wall. 36. *Butchers' Union Co. v. Crea-*

*cent City Co.* 111 U. S. 746. *Frisbie v. United States*, 157 U. S. 160, 165. *Plumley v. Massachusetts*, 155 U. S. 461. *Nutting v. Massachusetts*, 183 U. S. 553.

Although the requirements of the act are very strict, we cannot say that the determination of the Legislature, as between the interests of owners of stocks of merchandise and their creditors, was so far wrong as to render the statute unconstitutional. Within certain limitations, it is for the Legislature to judge of the policy and expediency of a law, if, in other respects, they have power to enact it. *Bancroft v. Cambridge*, 126 Mass. 438, 441. *Sawyer v. Davis*, 136 Mass. 239, 241. *Opinion of the Justices*, 163 Mass. 589, 595. *Commonwealth v. Pear*, 183 Mass. 242, 248. *Lawton v. Steele*, 152 U. S. 133.

The statute is not objectionable as applying only to a particular class. It applies to all who come within the reasons for its enactment. *Commonwealth v. Danziger*, 176 Mass. 290 and cases cited. *Rideout v. Knox*, 148 Mass. 868.

Similar statutes having the same object but varying considerably in their provisions, have been enacted recently in many other States. In Tennessee and in Washington the highest court of the State has decided that the statute there enacted is constitutional. *Neas v. Borches*, 109 Tenn. 398. *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549. The statute in Washington is very similar to that now before us. See also *Hart v. Roney*, 93 Md. 432, and *Fisher v. Herrman*, 118 Wis. 424, in which the courts of Maryland and Wisconsin seem to assume the constitutionality of their local statutes on this subject, which are somewhat less restrictive than that of Massachusetts.

*Demurrer overruled.*

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CHARLES E. HUBBARD, petitioner.

Norfolk. December 18, 1903. — January 7, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Executor. Limitations, Statute of.*

In R. L. c. 137, § 8, designating the cases in which an administrator *de bonis non* may be appointed, the debts "remaining due from the estate" which the statute makes the occasion for such an appointment are debts enforceable against the estate, and a debt barred by the special statute of limitations gives no cause for the appointment, unless there are equitable considerations which bring the case within R. L. c. 141, § 10.

PETITION, filed August 6, 1903, in the Probate Court for the county of Norfolk, for the appointment of an administrator *de bonis non* of the estate of John E. Humphrey, late of Weymouth.

The Probate Court made a decree dismissing the petition. On appeal, the case was heard by *Braley, J.* He ruled that on the facts, which are stated in the opinion, the Probate Court had no jurisdiction to make the appointment, and affirmed the decree of the Probate Court dismissing the petition. At the request of the petitioner he reported the case for determination by the full court, such decree to be entered as law and justice might require.

*G. P. Wardner*, for the petitioner.

*T. Hunt*, for sureties on the bond.

KNOWLTON, C. J. This is a petition for administration *de bonis non* of the estate of John E. Humphrey, deceased. Humphrey died May 12, 1891. On October 26, 1892, Erastus Worthington, public administrator, was appointed administrator of his estate. On November 21, 1894, the final account of this administrator was allowed, and it appeared that there were no assets of the estate. On January 20, 1898, Erastus Worthington died. This petition is brought under R. L. c. 137, § 8, which authorizes the appointment of an administrator *de bonis non* after the death, resignation, or removal of a sole or surviving executor or administrator before the estate has been fully administered, if there is personal property of the deceased not administered to

the amount of \$20, or debts to that amount remaining due from the estate, or anything remaining to be performed in the execution of the will, or if there is an order of distribution in accordance with the provisions of R. L. c. 150, § 26.

In the present case there is no personal property not administered, there is nothing to be done in the execution of a will, and there is no order of distribution. The petitioner contends that there is a debt remaining due from the estate. But the debt referred to was long ago barred by the special statute of limitations. R. L. c. 138, § 9; c. 141, § 9. There is thus "a positive bar arising from lapse of time, which cannot be waived by the administrator, nor in any way be answered or avoided. Its effect is therefore controlling and decisive." *Heard v. Lodge*, 20 Pick. 53, 58. After the running of this special statute, a previously existing debt can in no way be made effectual as a debt "remaining due from the estate," for which the estate can be held answerable, unless there are special equitable considerations which bring the case within the R. L. c. 141, § 10. *Thayer v. Hollis*, 3 Met. 369. *Lamson v. Schutt*, 4 Allen, 359. *Aiken v. Morse*, 104 Mass. 277. *Robinson v. Hodge*, 117 Mass. 222. In the present case there is no suggestion of such equitable considerations. We are of opinion that a debt "remaining due from the estate", within the meaning of this statute, is a debt which is enforceable in such a way that the estate may be legally liable to pay it.

The liability on which the petitioner relies as a foundation for this petition arose upon a bond to discharge certain real estate from a mechanic's lien, as appears by the opinion in *Holmes v. Humphreys*, 181 Mass. 181. No proceedings appear to have been taken to preserve the rights of the obligees in the bond under the R. L. c. 141, §§ 13, 14, 15, and the liability is not now a debt due from the estate, which authorizes the appointment of an administrator *de bonis non*.

*Petition dismissed.*

## AGNES HOLT vs. NATHANIEL E. CUTLER.

Middlesex. November 17, 1908. — January 8, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Negligence, In driving.*

In an action for personal injuries alleged to have been caused by the negligence of a driver of a team of the defendant, it appeared, that the defendant's servant was driving two horses in a loaded wagon at a walk, when the plaintiff, a girl of eighteen going in the same direction on a bicycle, attempted to pass on the left between the wagon and the sidewalk, where there was a space of four or five feet, and that when the plaintiff was opposite the middle of the wagon it swerved toward her and knocked her off the bicycle, causing the injuries. She testified that she rang her bell, but it did not appear that the driver heard it, and there was no evidence that the driver knew of the plaintiff's presence until the accident happened or had any reason to suppose that she was trying to pass him. *Held*, that there was no evidence of negligence on the part of the defendant's servant.

TORT for personal injuries alleged to have been received from being run over by a team negligently driven by a servant of the defendant. Writ dated October 10, 1900.

At the trial in the Superior Court *Lawton*, J. at the close of the plaintiff's evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*J. J. O'Connor*, for the plaintiff.

*S. K. Hamilton*, (*T. Eaton* with him,) for the defendant.

LATHROP, J. If we assume in this case that there was enough evidence of due care on the part of the plaintiff to warrant the submission of the case to the jury, we fail nevertheless to find any evidence of negligence on the part of the defendant's servant.

The servant at the time of the accident was driving a two horse loaded wagon at a walk. The plaintiff, a girl of eighteen, who was riding a bicycle and going in the same direction as the wagon, attempted to pass on the left between the wagon and the sidewalk, a distance of four or five feet. When she was opposite the middle of the wagon, it swerved or swayed towards her, and she was knocked off her bicycle and sustained the injuries complained of. She testified that she rang her bell; but it does not

appear that the driver of the wagon heard it or gave any indication of having heard it, and there was no evidence that he knew of her presence until the accident happened, or had any reason to suppose that she was trying to pass him. There was therefore no evidence of his negligence, even if he turned the horses, a fact that does not clearly appear.

*Exceptions overruled*

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RALPH C. HILL vs. EMILY E. ALLEN & another.

Middlesex. November 19, 1903. — January 8, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Landlord and Tenant. Contract, Construction.*

A written lease for the term of three years contained the following provision:

“ With the right and privilege of said lessees at any time on or before the expiration of this lease to purchase the above described leased premises for the sum of twenty-six hundred dollars; and the said lessor hereby binds himself to give unto the said lessees a good and sufficient deed of said leased premises upon the tender of said amount at any time as aforesaid; and if the said lessees shall elect to purchase said premises at any time during the continuance of this lease, then, and in that event, all moneys which shall have been paid as rent as herein-after provided shall be deemed and considered as paid on account for the purchase of said premises and applied in part payment of said sum of twenty-six hundred dollars.” *Held*, that, by giving a notice of their election to purchase, the lessees did not acquire a right to occupy the premises free of rent for three years, but, to exercise their option, must tender the \$2,600 and demand a deed within a reasonable time after notifying the lessor of their intention to purchase.

CONTRACT, on a covenant in a lease, for four months' rent. Writ dated March 23, 1900.

In the Superior Court *Sheldon, J.* ordered a verdict for the plaintiff. The jury returned such a verdict in the sum of \$38 and interest; and the defendant alleged exceptions.

*H. N. Allin*, for the defendant.

*S. H. Tyng & L. E. Fales*, for the plaintiff.

LATHROP, J. This is an action on a written lease, dated November 14, 1899, to recover the balance of rent due for four months from November 15, 1899, to March 16, 1900. At the



trial in the Superior Court the judge ruled that the plaintiff was entitled to recover this amount, and the case is before us on the defendants' exceptions to this ruling.

The lease in question was for three years from November 15, 1899, at the rent of \$150 a year, payable in monthly instalments of \$12.50 on the fifteenth day of each and every month during the continuance of the lease, with a right reserved to the lessor to enter and expel the lessees for non-payment of the rent.

The lease contained the following clause: "With the right and privilege of said lessees at any time on or before the expiration of this lease to purchase the above described leased premises for the sum of twenty-six hundred dollars; and the said lessor hereby binds himself to give unto the said lessees a good and sufficient deed of said leased premises upon the tender of said amount at any time as aforesaid; and if the said lessees shall elect to purchase said premises at any time during the continuance of this lease, then, and in that event, all moneys which shall have been paid as rent as hereinafter provided shall be deemed and considered as paid on account for the purchase of said premises and applied in part payment of said sum of twenty-six hundred dollars."

The defendants admitted that they entered under the lease on November 14, 1899, but did not pay any rent, and were expelled in the following April. The first named defendant testified that on November 29, 1899, she had a conversation with the plaintiff, in which she told him she would buy the place, and he said "Yes." She further testified: "I told him I had elected to buy that farm." The other defendant testified that he was present and heard the conversation. Nothing further appears to have been done. There was no tender of the \$2,600, and no deed was demanded.

The contention of the defendants is that as they had the option to purchase the farm at any time during the term of the lease, they were not obliged to pay rent after saying they would buy the place, and that, without doing anything further, they could go on and occupy the farm free of rent for three years. But it was clearly the duty of the defendants, under the terms of the option, within a reasonable time after notifying the plaintiff of their intention to purchase, to tender the \$2,600 and de-

mand a deed. Until this was done, they were liable for rent. See *Pomroy v. Gold*, 2 Met. 500; *Brown v. Davis*, 138 Mass. 458.

*Exceptions overruled.*

FREDERICK A. BRIGHAM & another, executors, vs. EDITH  
R. MORGAN & another.

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FREDERICK A. BRIGHAM, trustee, vs. SAME.

Worcester. January 21, 1903. — January 25, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Probate Court. Executor. Evidence. Practice, Civil. Trust, Duties of trustee as to investments. Words, "Before approving the same."*

St. 1889, c. 311, providing, that after any account of an executor, trustee or other person required by law to render an account in the Probate Court, has been filed, the judge of that court may, "before approving the same," appoint one or more auditors, authorizes the appointment of an auditor to report upon accounts of an executor previously approved by the judge, upon an application by the beneficiaries to reopen those accounts, made before the executor's final account has been allowed.

An expenditure by executors, from the funds of an estate, of \$80,000 in two years, in an attempt to develop a tract of vacant land upon the outskirts of a city in a distant State, appraised at only \$12,000, resulting in a net loss of \$40,000 at the end of three months after the two years, rightly is disallowed as an investment, even if the money had been lying in the hands of the executors uninvested and the executors would have been justified in temporarily investing it.

Even if oral directions, given by a testator in his lifetime to one who is expected to act as his executor, ever will justify that person when appointed executor in making an expenditure otherwise improper, yet if in giving such oral directions the testator stated that he had made arrangements in his will, he must be understood to have referred to that instrument as the guide, and unless the will provides otherwise the executor will be held to the liabilities imposed upon him by the general law.

On the issue of disallowing in an executor's account the expenditure of a large sum of money in attempting to develop a tract of vacant land upon the outskirts of a city in a distant State, no exception lies to the exclusion of evidence, that men of prudence, discretion and intelligence in the East, especially in Boston, as well as conservative institutions for savings, were making investments similar to that in question.

No exception lies to the exclusion of evidence of a fact afterwards found in favor of the party offering the evidence.

In an account of an executor, an investment properly is disallowed of \$2,500 from the funds of the estate, made by depositing that amount with a loan and trust

company organized in a distant State upon the understanding that an unsecured debenture bond should be issued for the deposit, where the trust company has failed and the bond is of no value.

An assent in writing by the beneficiaries of an estate to the allowance of a series of accounts, filed by two executors before their final account, does not operate as a ratification of improper investments stated in the accounts, if the accounts were not true, containing misrepresentations wilful on the part of one of the executors and which the other executor did not know to be true.

Two executors, one of whom was sole trustee under the same will, made an improper investment of \$80,000 which proved to be worth only \$40,000. This investment was turned over by the executors and received by the trustee at the value of \$80,000. Later the trustee rendered a series of probate accounts covering nearly seven years, in which he stated the investment at the same value. Both of the executors, one of whom was the trustee, acted in bad faith. *Held*, that, not only were the executors liable for the loss on the investment, but also the trustee as such was liable for the same amount. HAMMOND, LORING, & BRALEY, JJ. dissenting.

Where executors are found to have acted in bad faith in making an improper investment of the funds of the estate, it is right to charge them with interest at the rate of six per cent upon the amount of the loss on the investment.

BARKER, J. These cases bring to this court as the Supreme Court of Probate the statement and allowance of two sets of probate accounts rendered to the Probate Court in Worcester in the estate of Thomas Rice, deceased. The first set consists of the third, fourth, fifth and sixth accounts of Frederick A. Brigham and Herbert A. Maynard as executors of the will of Rice, who died on May 29, 1888, which was admitted to probate July 3, 1888, when the executors were appointed and qualified, giving separate bonds.

The third executors' account, assented to in writing by the parties interested, and sworn to by the accountants on July 29, 1891, was allowed by the Probate Court on September 11, 1891.

The fourth executors' account, also assented to, and sworn to on August 8, 1893, was allowed by the Probate Court on July 6, 1894.

The fifth executors' account, also assented to, and sworn to on August 4, 1896, was allowed by the Probate Court on August 25, 1896.

The sixth executors' account seems to have been presented to the Probate Court on May 12, 1898. In dealing with it that court reopened the third, fourth and fifth accounts, and its decree, reforming and allowing the third, fourth, fifth and sixth

accounts, was entered on October 2, 1900, and an appeal therefrom was taken and entered in the Supreme Judicial Court by each of the two executors and by the persons who are sureties on their official bonds, but no appeal was taken by the beneficiaries.

The first trustee's account, assented to in writing and sworn to by the accountant on July 29, 1891, was allowed by the Probate Court on September 11, 1891.

The second, assented to and sworn to on April 22, 1892, was allowed on October 11, 1892.

The third, assented to and sworn to on June 8, 1893, was allowed on June 6, 1894.

The fourth, assented to and sworn to on June 25, 1894, was allowed on August 25, 1896.

The fifth account was sworn to on August 17, 1895; the sixth on August 10, 1896; and the seventh on January 14, 1897. These three seem to have been presented to the Probate Court on January 14, 1897. The eighth was sworn to on September 15, 1897, and presented to the Probate Court on September 17, 1897. There was no assent in writing by the parties interested to the fifth, sixth, seventh or eighth accounts and these were before the Probate Court pending allowance until April 18, 1900. In the meantime, on July 12, 1897, there was a petition to the Probate Court for the reopening of the first four trustee's accounts, which was referred by that court to the same auditor to whom the investigation of the last four trustee's accounts had been committed.

On April 10, 1898, the Probate Court by its decree reformed and allowed the eight trustee accounts, in effect reopening the first four, and an appeal to the Supreme Judicial Court was duly taken and entered from the decree of April 10, 1898, by the trustee and by the sureties on his official bond, but no appeal was taken by the beneficiaries.

While the cases were pending in the Probate Court upon the allowance of the accounts, that court removed the original executors and appointed an administrator *de bonis non* with the will annexed and also removed the original trustee and appointed a new trustee in his place. No appeal was taken by the administrator *de bonis non* or the new trustee from the decree allowing the accounts in the Probate Court.

Upon the appeals the matters of the executors' accounts and of the trustee's accounts were heard together by a single justice of the Supreme Judicial Court, and on January 25, 1902, decrees were entered by him in each matter, affirming with modifications the decrees of the Probate Court. Bills of exceptions taken by Brigham as executor, Brigham as trustee, and by Maynard as executor at the hearing before the single justice were filed, allowed and entered in the full court; and appeals from the decrees of the single justice were taken and entered in the full court by Brigham as executor and also as trustee, and by Maynard as executor.

The exceptions and appeals to the full court were argued on January 21, 1903, and afterwards were considered upon the briefs by all the justices.

The testator left a widow and two children, the latter being minors at the time of the testator's death, the elder being a daughter and the younger a son.

His will gave to his wife his homestead and the personalty connected with it, and also gave certain minor legacies. It created two funds of \$15,000 each, one for the benefit of each child, the income of which was to be paid to the guardian of the child during the minority. The fund for the daughter was to be paid over to her when she should arrive at the age of twenty-one, and that for the son was to be paid to him when he should arrive at the age of thirty.

The residue was devised and bequeathed to the executors, but in trust, namely, to pay over and transfer to his wife one third part thereof in value and to pay over or transfer the other two thirds thereof to trustees to hold and manage for the benefit of the two children. It is this fund the accounts of the trustee of which are the trustee's accounts in question.

The daughter became of age on February 2, 1890, and the son before July 5, 1894.

The controversy between the accountants and the beneficiaries arises from investments of \$81,100, made by the executors in mortgages upon land in Kansas, and of \$2,500 in a bond of or a deposit in the Commonwealth Loan and Trust Company of Kansas. These investments were disapproved by the Probate Court and by the Supreme Judicial Court sitting with a single

justice, and the changes from the accounts as rendered by the accountants made upon the allowance of the accounts by the Probate Court and by the Supreme Judicial Court in the final decrees entered by the single justice come from holding that the investments mentioned were unwarranted, or in other words that they were a maladministration on the part of the accountants. Whether these investments should be so held is the chief question in controversy. If they should be so held, the principal remaining question is how the accounts should be reformed, stated and allowed.

The accounts were referred to an auditor by the Probate Court, and the auditor's reports, although objected to, were admitted in evidence in the Supreme Judicial Court in the hearing before the single justice. The other evidence at that hearing is in the record, which also contains a memorandum made by the presiding justice concerning the facts found by him.

The Probate Court while holding that the investment of the funds of the estate in the Kansas mortgages and bond to the amount of \$83,600 of principal were unwarranted did not charge the executors with the whole sum so maladministered. The auditor found that the Kansas mortgages which had been turned over by the executors to the trustee at their face value of \$81,100 were in fact worth when so turned over \$40,000, while the Kansas bond was worth nothing. The Probate Court struck out from the executors' accounts all credits on account of the principal of the Kansas mortgages and bond except the sum of \$40,000 found by the auditor to have been the value of the mortgages when turned over to the trustee. The Probate Court also charged to the executors sums for interest at six per cent per annum on the \$43,600 thus disallowed. It also rejected certain other items as a corollary of its rejection of the \$43,600, as, for instance, credits claimed by the accountants for the expense of this litigation.

The trustee voluntarily had taken over into his trust the Kansas mortgages at their face value of \$81,100, and the Kansas bond at its face value of \$2,500, and had put them into his official inventory at the same figures and had charged himself with them in his trustee's accounts at the same amount for principal. He took and should now have the mortgages and bond as trustee,

and when he shall turn them over to the new trustee, if he has administered them properly since he received them, he will then be entitled to a credit for their amount as principal in the sum of \$40,000 found by the auditor as their actual value. The trustee was charged by the Probate Court with interest at the rate of six per cent per annum on the amount of \$43,600 lost by the improper investment in the Kansas mortgages and bond.

The theory of the action of the Probate Court was the same in dealing with each set of accounts, and was to hold the executors answerable for the loss of \$43,600 of principal and for interest upon the amount lost, and to hold the trustee answerable for the same loss of principal, he having taken over and charged himself with the unwarranted investments at their face value, and with interest upon the \$43,600 from the beginning of his work as trustee.

The question is raised by the bills of exceptions whether the reports of the auditor made to the Probate Court were admissible in evidence in the hearing in the Supreme Judicial Court. It is contended that the appointment of the auditor by the Probate Court was not authorized by law. In discussing this question, we assume in favor of the accountants that the power of the Probate Court to appoint an auditor rested at the time of these proceedings upon St. 1889, c. 311, which, so far as material, reads as follows: "After any account of an executor, . . . trustee or other person required by law to render an account in any Probate Court, . . . the judge of said court may, before approving the same, appoint one or more auditors," etc.

The auditor has reported only upon the accounts of the executors. At the time the auditor was appointed, the executors had filed six accounts, of which the first five had been consented to and allowed without a hearing. No final account had been filed. The executors' accounts were therefore still open for correction. In this state of affairs, the children of the testator, each being then of age, asked that the accounts be reopened on the ground that they were incorrect. We do not understand that, under the circumstances disclosed in the auditor's report, the accountants contend that upon this request the Probate Court had not properly before it the question whether the accounts should be re-

opened, and if so, what corrections should be made and how they should be finally allowed. Their contention is that the statute is not applicable to an account which has once been allowed, even although the Probate Court has jurisdiction to reopen such an account for correction and upon proper proceedings has that question before it for adjudication.

We are not inclined to adopt this narrow construction of the statute. The statute is remedial in its nature and should receive a construction consonant with its manifest purpose, which is to relieve the court from making a personal examination of the details of complicated accounts, and to enable it to call in the services of an auditor to assist. The reason for appointing an auditor exists whenever such an examination becomes necessary upon a question involving the final approval of the account. The statute should not be construed to forbid the appointment of an auditor whenever the judge of probate has occasion to make such an examination as a preliminary to a final approval, simply because he has once approved the account. In a general sense, it may be said that an account is before the judge for approval whenever by a motion to reopen or otherwise he has before him the question whether he will finally approve it or not; and that is none the less so in the case where he has once approved it. Whenever the question of approval comes before him for decision he is entitled to the services of an auditor before deciding the question. This construction is in accordance with the spirit of the statute, and not inconsistent with the fair meaning of the phrase "before approving the same." See *Longley v. Hall*, 11 Pick. 120.

Concerning the controversy as to the investment of the sum of \$81,100 in mortgages upon land in Kansas, the principal question is whether the loss which was incurred in an attempt to develop certain land in that State owned in common by Brigham and the testator should be borne by the estate, or should fall upon the accountants. Upon this matter it appears from the memorandum of the presiding justice that he found the facts to be substantially as follows.

A few months before the death of Rice the testator, which occurred in May, 1888, he and the accountant Brigham purchased a tract of land of about forty acres, situated upon the outskirts



of the city of Topeka in the State of Kansas, paying therefor the sum of \$22,000. They held this land as tenants in common. Rice paid the entire purchase money, and Brigham gave his note to Rice for one half thereof, with the understanding and agreement that the note should be paid out of the money received from the first sales of lots in the tract. Rice and Brigham caused the land to be plotted and divided up into streets and building lots, to the number of three hundred and eighty-four lots, with a frontage of twenty-five feet each; and a plan showing the streets and lots and designating the tract as the "Brigham and Rice Addition" was duly recorded in the registry of deeds.

The auditor finds that at the time of the death of Rice none of these lots had been sold, but it is stated in the exceptions that just before his death, in accordance with the plan for handling and developing this property which had been agreed upon between him and Brigham, an agreement was made which provided for the loan of money by Rice to a certain prospective purchaser for the purpose of building a house upon one of these lots.

While matters were in this condition, Rice died, his will was admitted to probate on July 8, 1888, and on the same day Brigham and Maynard duly qualified as executors. The inventory filed in the September following showed personal estate appraised at \$326,587.76, and real estate in this Commonwealth appraised at \$28,675.50. To this inventory was attached a memorandum of real estate outside of Massachusetts, including one undivided half of this land, "valued by the executors at \$12,000."

After the executors were appointed, they proceeded in the following manner with the funds of the Rice estate to develop and put upon the market this land. They employed an agent residing in Topeka, to negotiate sales of lots and to arrange for mortgages back from the purchasers to secure the purchase money and additional loans to be made to them to enable them to build houses. Lots, usually three in number, of twenty-five feet by one hundred and twenty-five feet each, were sold to a purchaser at a valuation of \$500, and a deed thereof was given by the executors. The purchaser at the same time gave a mortgage thereon to Brigham for an amount sufficient to cover the pur-

chase price and the estimated cost of building a house. The purchaser then proceeded to build the house, and, as the work progressed, money belonging to the estate was advanced to pay the cost of building. The purchaser paid no money to the executors. In some instances he expended some money and labor in making improvements in addition to the amount advanced by the executors, but in general the entire cost of building and improvement was paid by the executors. The houses were of poor quality, the majority of them costing from \$1,000 to \$1,200 each. About forty were built between July 8, 1888, the time of the appointment of the executors, and July 15, 1890. These mortgages, as before stated, were made directly to Brigham, and were so made for the purpose of enabling him conveniently to manage and deal with the same and with the view that he would ultimately take and hold the same as trustee. At the time the executors began to advance the money and take the mortgages, it was agreed and understood between them that upon the appointment of Brigham as trustee under the will he would take the mortgages at their face value, as so much cash, as a part of the trust fund, and would receipt to his co-executor Maynard in full for the amount thereof, the same as though the mortgages were cash. When sales were made and mortgages taken back, Brigham applied one half of the price fixed as the valuation of the lots toward the payment of his note, given as above stated, to Rice. Brigham during all this time was fully conversant with the property and its surroundings, but Maynard never had seen it, knew nothing about its value, and in these matters acted wholly upon the advice and opinion of Brigham. He however signed with Brigham the drafts and checks by which the money was sent to Topeka, and was fully aware of the manner in which the investments were made. The land was situated about three miles from the centre of the city, and this money was expended at a time of inflated values. The purchasers and mortgagors were as a rule poor and unstable, and becoming discouraged abandoned their properties. Under these circumstances and in this way, the executors took from the estate and expended cash to the amount of \$81,100.

The result was what might have been expected. With a few minor exceptions no interest has ever been paid upon these

mortgages, and as early as October 2, 1890, the time when Brigham took them to himself as trustee and gave to his co-executor the receipt hereinafter named, in which he valued them as cash to the amount of their face value, all of the mortgagors had defaulted in the payment of principal and interest. Some had abandoned their properties. Some of the mortgages had been foreclosed or the equity purchased by Brigham, and the value of the property represented by them was only \$40,000. In a word, the executors, in their attempt to develop, in the manner above stated, at a time of inflated values, a tract of vacant land situated upon the outskirts of a city in a distant State, and in which the estate according to the appraisal was interested only to the extent of \$12,000 and, according to the cost, only \$11,000, actually expended in two years over \$80,000 in cash, with the net result that in three months afterwards, namely, in October, 1890, there was a loss of more than half of the sum expended. Such an expenditure cannot be justified. It was the duty of the executors to collect and hold the estate. This expenditure was not required to preserve the interest of the estate in the land. Even if the money had been lying in their hands uninvested, which is not shown to have been the fact, and even if, pending the appointment of the trustee, the executors would have been justified in temporarily investing it, these transactions cannot be held to be proper investments. While it is true, as suggested by the accountants, that the propriety of an investment is to be judged of with reference to the time in which it is made, still, when it is considered that the scheme in pursuance of which this money was spent belongs to a class of business operations generally of a speculative and hazardous nature, and also that in this case it was pursued under circumstances which more and more indicated that the demand for the land and houses was apparent and not real, and that in substance the executors were building houses which no responsible persons would buy, it cannot be denied that these transactions fall far short of that prudence and sound business judgment which is required of persons acting in a fiduciary capacity. It was a hazardous investment in a hazardous class.

It is contended on behalf of the accountant Maynard that, inasmuch as the mortgages were not made to the executors but

to Brigham, and the money was lent with the intention that they should be received by him when qualified as trustee, as a part of the trust fund, and were actually subsequently so received by him, the investment was made by Brigham and not by the executors, and that he as trustee and only as trustee is liable, and that the executors are not liable. We cannot accept the view that the investment was not made by the executors. While it is true that the matter was left by Maynard largely if not entirely to Brigham, still the money was in their hands as executors and Maynard joined in making the drafts and checks sent to Kansas. Moreover there was no person to whom as trustee any money could be properly paid, or by whom as trustee any money could be invested, and both accountants knew this. The mortgages did not run to Brigham as a trustee but as an individual, and were held by him for the executors under the agreement heretofore named between him and Maynard that when he qualified as trustee he would take them from the executors as a part of the trust fund. It further appears that, until October, 1890, when the securities were turned over to Brigham as trustee, the executors in their various accounts treated them as belonging to the estate and as assets in their hands as executors. They charged themselves with the interest on the same, and, although in fact the interest had not been received, Maynard supposed that it had been and that these charges were correct. The charges, therefore, although not in fact true, show Maynard's idea of the relation of the executors to the investment. In view of these and other circumstances, it seems clear that the executors made this investment as such, and that both of them so understood it.

It is further contended by the accountants that these investments were made in pursuance of a plan settled upon by Rice before his death, and in compliance with verbal instructions which he gave to them as to what they as executors should do; and in support of this contention they introduced evidence to show that Rice, a few days before his death, while ill, told Maynard that in partnership with Brigham he had made an investment in the West; that they had bought a tract of land which they had begun to develop; that it had been plotted into lots, streets had been constructed and an electric road had been

built through it; that the lots were to be sold and that money was to be lent to the purchasers with which to build houses upon them; that mortgages were to be taken back to secure the loans; that Brigham was familiar with the land, and that he, Rice, had made provision in his will for carrying on the matter in case he should die while it was in progress; and that he wanted Maynard, if appointed executor, to allow Brigham to manage this property because he was familiar with it.

We do not find it necessary to decide whether, or how far, verbal directions given by the testator in his lifetime to a person who is expected to act as his executor will justify an executor, because, even if this testimony was believed by the presiding justice, it is clear that after all Rice expressly stated that he had made arrangements in his will, and he must be understood as referring to that instrument as the guide. Without reciting in detail the provisions of the will, it is sufficient to say that there is no express allusion in it to this property; that in its general framework there is clearly manifested an intention that the estate shall be prudently managed, and that investments shall be made in the exercise of sound judgment, "notes properly secured by first mortgages" being expressly named.

These facts, taken in connection with the further fact that the power to sell which is contained in the will is not confined to the persons named as executors, but is given to any administrator *de bonis non*, and is couched in the usual language of such provisions, clearly show that no inference can be drawn from the will that these executors were not to be held to the liabilities imposed upon them under the general law.

The evidence offered to show that, at the time these investments were made, men of prudence, discretion and intelligence in the East, and especially in Boston, as well as conservative institutions for savings, were making just such investments in mortgages, in addition to western loans similar in all respects to the investments in question, was properly excluded. This is not a case where, as in the case of some well known classes of securities, such as bonds or stocks, it could be shown that they had a general market value and a good reputation so that prudent people had made investments in them. It was simply an attempted development of a piece of land in the outskirts of a

certain city. It is manifest that the propriety of such an investment must depend upon the peculiar circumstances surrounding it, and evidence that prudent and conservative men had seen fit to embark in a similar undertaking in some other locality would not aid in passing upon the propriety of this. Either such evidence must be of the most vague and general character, and therefore of no practical value, or, if special, it would lead to an inquiry into special circumstances and to comparisons in no way helpful. The presiding justice might properly exclude it in the exercise of his discretion.

The executors were not prejudiced by the exclusion of the evidence offered to show that at the time these loans were made there was an agreement between Maynard and Brigham that the latter, when he should be appointed as trustee, would accept these securities as trust securities at their face value, and would accept the same as cash. The court found such to be the fact.

We are therefore of opinion that the executors had no right to invest the \$81,100 in the Kansas mortgages, and that those mortgages were not securities which the trustee rightfully could receive as part of the trust estate.

We have the same view as to the deposit of \$2,500 in the Commonwealth Loan and Trust Company of Kansas. This was a land company organized under the laws of Kansas having a branch office in Boston where the deposit was made, upon the understanding that a debenture bond of the company should be issued for the deposit. There was no mortgage or other security for this bond, and the company soon after failed and nothing has been received in payment of the bond, which the auditor has found to have had no value.

The executors not having been warranted in making the investments and the trustee not having been warranted in receiving or holding them as part of the trust fund, we are to consider how their respective accounts shall be reformed in consequence of the maladministration.

The accountants contend that even if these investments were unwarranted they are exonerated from liability for them because their acts with reference to the investments have been ratified by the consent given by the beneficiaries to the allowance of the

early accounts in which the investments were stated. One simple reply to this, however, is that the accounts were not true. They represented that some thousands of dollars had been received from the sales of land, and that the interest upon the mortgages had all been promptly paid, whereas in fact not a dollar in cash had been paid to the estate by any purchaser, for the land, and all the mortgages were in default upon the interest. Even if it be true that the beneficiaries knew in a general way that the executors were selling the land and lending money to the purchasers for building purposes, the accounts seemed to show a healthy demand for the land and a buying class of purchasers, a very different state of things from that which would have been disclosed if the facts had been truthfully stated. This misrepresentation, so far as respects Brigham, was wilfully untrue because he knew the facts, and so far as respects Maynard, was fraudulent in law if it was a statement made by him as true of his own knowledge when he did not know it to be true. Such a misrepresentation is sufficient, under the circumstances disclosed by the auditor, to avoid the consent given by the beneficiaries, and the case therefore stands as if such consent had not been given.

Another contention is that the executors have been relieved from their liability by the action of Brigham before and after his appointment as trustee.

In this connection it is to be noticed that both Brigham and Maynard acted in bad faith. The finding to this effect of the single justice by whom the cases were heard in the Supreme Judicial Court was contrary to that of the auditor, the decrees of the Probate Court containing no express statement upon the matter. The finding by the single justice of the Supreme Judicial Court, the accountants having testified before him in the hearing, and other oral testimony taken must stand. The fact that Brigham was personally interested in the development of the land and that this interest was known to Maynard his co-executor and that the mortgages ran to Brigham individually, with the misrepresentations as to payment of interest on the mortgages, and the concealment of the fact that foreclosures of them were being made, all were circumstances tending to support the finding of bad faith on the part of both Brigham and May-

nard, so that the exceptions on this branch of the case must be overruled, and the finding of bad faith must stand.

Before dealing with the question of Brigham's action as trustee, we think it best to consider whether, when an executor has mal-administered a fund by investing it in improper securities and these securities have been received improperly from the executor by a trustee and unwarrantably placed in the trust fund, both delinquents can be held answerable in their accounts. The question should have the same answer whether the two officials are one person or different persons. Different acts of one man done in two separate capacities may make it his duty to account for the same matter in each of those capacities. A., receiving as executor money which it is his duty to turn over to himself as trustee, by putting the money into an improper investment has made it right to charge him in his executor's account with the whole fund. As trustee it is his duty to get the whole amount of the fund into his hands, and to hold it in proper securities and apply it to the purposes of the trust. If, instead of performing this duty, he improperly accepts and takes and holds as trustee the unwarranted investments, and does nothing to get the whole amount of the fund into his hands in property which he may rightfully hold in the trust fund, he may properly be charged by the court in his accounts as trustee with the whole amount of the fund for which he has receipted and with which he has charged himself in his inventory and his accounts as trustee and which it was his duty to get in, put into proper securities and hold.

The liability of the executor to be charged in his executor's account with the whole amount of the money which as executor he has put into unwarranted investments comes from his official relation as executor to the money. The liability of the trustee to be charged in his account as trustee comes from his official relation to the trust fund of which it is his duty as trustee to see that the money is made a part, and from his having taken over as a part of the corpus of the trust the unwarranted investments and his having inventoried and kept them as a part of the trust, and charged himself with them in his accounts as trustee as of full value. That he has failed to discharge his duty as executor is no sound defence when it is proposed to charge him for his



default as trustee. Nor is it a sound defence when it is proposed to charge him for his default as executor to show that as trustee he has committed another maladministration, namely, by improperly accepting and holding as good the unwarranted investments as part of the corpus of the trust fund.

The logical course is to charge him in each capacity with the sum which he has maladministered. If he or his sureties in either capacity once make restitution of the whole sum maladministered, with proper interest, the beneficiaries can require nothing more, being entitled to but one satisfaction. But until such restitution is made there is no injustice done either to the delinquent principal or his sureties in charging him in his probate accounts in each capacity with the full amount of the estate which he has maladministered. In stating each account the question is with what sums he should be charged and credited. How ultimate losses to beneficiaries are to be borne, and how sureties upon different bonds shall make or have contribution in respect of prospective payments is not the decisive issue upon the settlement and allowance of accounts like those now under consideration.

The statement of *Wilde, J.* in *Conkey v. Dickinson*, 13 Met. 51, at page 58, that it was clear that Dickinson, whose bond as guardian was in suit and who also was the executor of the will which gave to his ward the legacy which remained unpaid, was not liable for the payment of the legacy in both capacities, is to be taken in connection with the circumstances of that case. The subsequent statement in the same paragraph, that it is "well settled, that if a legacy is given by will, and the same person is executor and trustee or guardian for the legatee, he is bound to account for the legacy, as executor, if he has sufficient assets, unless he has rendered an account in the probate office, charging himself as trustee or guardian, and that account has been allowed by the Probate Court" shows that the true test whether an executor shall be charged in his probate account is whether, having received funds, he has administered them in accordance with law. We know of no declaration in our decisions that any person who in an official capacity has received funds is not liable to account for them in that capacity; and we see no reason why it may not be just to hold that he is so liable. Of course proof that the

funds have in fact gone to some extent to the benefit of those entitled to them may, as was done by the Probate Court in the present instance, make it just and equitable to lessen the charge to be made in stating the account.

We do not put the liability of the trustee to be charged upon his account in a case of this kind merely or chiefly upon his duty to get in all the property that is subject to the trust; but largely upon the fact that he has assumed to act officially in regard to the whole fund. He has in the present instance himself dealt as trustee with the Kansas investments. As trustee he was entitled to the rest and residue of the estate. As a part of that he took the Kansas investments. They were receipted for by him as trustee at their full face value and as so much cash. He carried them along in the same way through seven or eight accounts rendered to the Probate Court both before and after he had settled with the widow. It is not unjust or inequitable as to him or as to the sureties on his bond as trustee to say that he shall account for the sums which he has thus treated as invested and as so constituting a part of the trust fund. He has by his own conduct made himself accountable for the whole fund, and liable, as for making an improper investment, for that part of it which he received in the form of improper investments. He undertook to receive, manage and control the entire fund as if it had been paid to him in money. He took all the bad investments and receipted for them at their face value as if they had been good. He included them in a series of accounts covering nearly seven years. In schedules annexed to these accounts he treated them as good investments, and as representing with other property the entire fund undiminished by losses. Under these circumstances his liability upon his account is the same as if, as trustee, he had received the fund in money and invested it in the mortgages and the bond. In his official capacity as trustee he makes the investments his own, and must be charged for that part of the trust property which is represented by them.

The executors in their official capacity and contrary to their official duty made improper investments from which the beneficiaries have suffered. The trustee in his official capacity and contrary to his official duty has taken over the same improper investments and held them in the trust as good, from which

conduct the beneficiaries have suffered. Both the trustee and the executors, in their respective official capacities should be held accountable for the loss to the beneficiaries, until the latter have been fully compensated, in like manner as the holder of a promissory note is entitled to judgment and execution for the full amount of the note against both maker and indorser, or the obligee in a bond is entitled to judgment and execution for the full amount against the principal and the sureties. There might be found a more remote analogy, upon which we do not rely, in the right of one injured by a tort in which more than one person was a tortfeasor, to have judgment and execution for his full damages against each tortfeasor.

When a probate account is up for allowance, and it appears that the accountant has made an unwarranted investment of funds he may be charged with the full amount of the money improperly invested. *Burgess v. Keyes*, 108 Mass. 43, 45. *Kimball v. Perkins*, 130 Mass. 141, 143. *Thayer v. Kinsey*, 162 Mass. 232, 236. This is "to put the whole assets of the estate, not already disposed of and accounted for in a proper manner, into the control of the judge of the Probate Court, so that he may proceed with its settlement and direct the course of its further administration." See *Choate v. Arrington*, 116 Mass. 552, 556.

We therefore assume that the maladministration of the executors, by which they unwarrantably invested the sums put by them into the Kansas mortgages and the trust company deposit, makes it right to charge them in their executors' accounts with the whole loss incurred by their maladministration, and that the maladministration of the trustee, in improperly accepting the unwarranted investments and in omitting to demand and to get in the full amount of the trust fund in cash or proper securities, makes it right to charge him in his trustee's account with the whole amount which it was the duty of the executors to pay over to him as trustee. We are to inquire whether any sufficient reason is shown why such charges should not be made in each set of accounts.

The contention that such charges should not be made because of the assent of the beneficiaries has already been disposed of.

Another contention of the executors is that they are discharged from liability as executors because they have caused an actual

transfer of the unwarranted securities to be made to the trustee, he having agreed when the investments were made that when appointed trustee he would accept them as trustee, and because he has given to the executors his receipt as trustee for the securities as of full value, and because executors' accounts and trustee's accounts showing this transfer from the executors to the trustee have been rendered to the Probate Court and allowed.

Aside from the rendering and allowance of probate accounts, this contention seems to us to be disposed of by the fact that the executors and the trustee all acted in bad faith. Maladministration of funds so committed, whatever form it took or however attempted to be disguised by a receipt, could not discharge the executors from their liability to account for money which had come to their hands.

An actual appropriation or transfer to a trustee by an executor of funds which are to be part of a trust fund, with the rendering of a probate account containing a statement of such appropriation or transfer and the final allowance of that account in court, works a discharge of the executor's liability as such. See *Newcomb v. Williams*, 9 Met. 525; *Conkey v. Dickinson*, 13 Met. 51; *Minot v. Amory*, 2 Cush. 377; *Miller v. Congdon*, 14 Gray, 114; *Choate v. Arrington*, 116 Mass. 552; *Crocker v. Dillon*, 133 Mass. 91; *Bassett v. Granger*, 140 Mass. 188; *Little v. Little*, 161 Mass. 188. The reason is that the executor stands as having performed his duty as to the funds which came to his hands, in that, whether or not at some period of his administration he had dealt improperly with the fund, he has finally accounted for it according to law, as is shown by the decree, unreversed, allowing the account.

But the record shows no probate account now standing as allowed, bearing a statement of the appropriation or transfer to the trustee at their face value of the improper securities. All such accounts have been reopened by the Probate Court, either expressly or by necessary implication, and in the present state of the proceedings are before us, not as allowed accounts but for proper action. They furnish no ground for a discharge of the executors or of the trustee from liability to account respectively for the whole loss to the testator's estate, or to the trust estate.

What information we have as to the present title to the assets which now represent the unwarranted investments and their present value is found in the reports of the auditor to the Probate Court, and in the decree of that court on the executors' accounts. The first report was filed on December 14, 1897. It states that at that time the title to about all the lands covered by the Kansas mortgages stood in the name of Brigham as an individual, or in that of his son or daughter; and also that about all the lands had been sold for taxes, but that the right of redemption had not then expired. The second report, filed July 22, 1898, states that the value of the mortgages at the time when they were taken over by Brigham as trustee, August 1, 1890, was \$40,000, and that of the trust company bond nothing. The decree of October 2, 1900, entered by the Probate Court, reforming and allowing the executors' accounts, states that the value of the Kansas mortgages and of the trust company bond, which together cost the executors \$83,600, when the trustee received the same was only \$40,000.

The Probate Court increased the balance due from the executors by their third account, by this difference of \$43,600 between the par value of the Kansas investments and the value of the same when they were received by the trustee, and by a further sum for interest on the improper investments. The decree of the Supreme Judicial Court entered upon appeal affirmed the allowance of the executors' accounts with these charges. The effect of this was to allow the executors credit for the sum of \$40,000 as the actual value of the Kansas investments when the same were turned over to the trustee out of the \$83,600 which they had improperly invested. Neither the beneficiaries of the trust, who are now of full age, nor the new trustee appointed in place of Brigham removed, have appealed from the decrees of the Probate Court or from those entered in the Supreme Judicial Court by the single justice. It must be assumed that the Kansas investments were made part of the trust fund and were of the value of \$40,000 when received by Brigham as trustee, and that the beneficiaries are content to have them made a part of the trust fund at that valuation as of that time. While, therefore, those decrees might perhaps be changed so as to charge the executors in account with the whole \$83,600,

under the circumstances we do not deem it incumbent on us so to do.

The same consideration, that the \$40,000 worth of securities was put by the executors where it was worth that amount to the fund, does not require the trustee now to be credited, in the statement of the trustee's accounts, with the value of the securities at that sum, for the reason that they are still a part of the trust in his hands, to be turned over by him at that valuation to his successor.

The finding of bad faith on the part of both Brigham and Maynard makes proper the charges of interest at the rate of six per cent made in the decrees of the Probate Court and of the Supreme Judicial Court.

The decree of the Probate Court upon the executors' accounts provided that Maynard should be liable only for whatever portion of the sums of \$48,600 added to the balance against the executors in their third account as principal, and of \$13,516 added to the same balance as interest, as the beneficiaries under the trust may be unable to recover from Brigham and his sureties. This portion of the decree of the Probate Court was disaffirmed by the decree of the Supreme Judicial Court, and we think rightly disaffirmed. It is not germane to the present proceedings to attempt in such a manner to adjust in them the respective rights of Brigham and Maynard or of their respective sureties.

We see no reason to discuss further or in detail the several requests for rulings at the hearing in the Supreme Judicial Court, or the other questions raised by the different bills of exceptions and the appeals, further than we now have considered them.

The concluding sentence of the decree of the Probate Court upon the accounts of the trustee is this: "All investments of this trust fund in mortgages on real estate in the State of Kansas and in real estate there situated and the loan of \$2,500 to the Commonwealth Loan and Trust Company are hereby disapproved." Taken in connection with the whole record we understand this to mean merely that the Kansas investments are held to have been unwarrantable investments making the trustee liable to the loss of \$48,600 upon them as principal, and that it does not mean that the trustee cannot be allowed in respect to

them as principal the sum of \$40,000 found to be their value when turned over to him as trustee. So construed we think the sentence quoted should stand as part of the decree.

The result is that the decrees of the Supreme Judicial Court upon the accounts of the executors and upon the accounts of the trustee are to be affirmed, and the exceptions are to be overruled.

*So ordered.*

HAMMOND, J. I dissent from so much of the foregoing opinion as holds Brigham answerable as trustee for the loss incurred in the attempted development of the land in Kansas.

The executors expended in that matter \$81,100. The proceeds of this investment at the time they were delivered to the trustee were worth \$40,000 and no more. The loss was therefore \$41,100. I do not see upon what principle the trustee can be held answerable for this loss, or charged with the amount of it. He cannot be held upon the ground that he received it as trustee because he did not receive it. He cannot be held upon the ground that as trustee he made the investment or had anything to do with making it. The money was spent and the loss incurred by the executors; and so the court holds. No trustee was then in existence. He cannot be held upon the ground that by his receipt to the executors of October 2, 1890, he released them from their liability and so did an act inconsistent with his duty to the interests represented by him as trustee. The act is repudiated by the *cestuis que trust* and is declared invalid by the court. The liability of the executors stands as though the receipt had not been given. If, therefore, it be suggested that he failed in his duty to prosecute the executors, the answer is that the right of action against them and their sureties is precisely the same as before, and there is nothing to show that there has been any change in the situation to the detriment of the estate. Nor can he be held upon the ground that he has charged himself with the amount lost, because the theory upon which he has charged himself is rejected by the court. If it be suggested that this is a mere matter of accounting, the answer is that the amount found due from him as trustee is binding not only upon him but also upon the sureties upon his bond. *Bassett v. Fidelity & Deposit*

Co. 184 Mass. 210. In a word, the loss was made by the executors; and by no act or default of the trustee as such has the estate been damaged. And the theory upon which the trustee charged himself has been rejected.

Mr. Justice LORING and Mr. Justice BRALEY concur in this opinion.

The case was argued at the bar in January, 1903, before Knowlton, C. J., Morton, Hammond, Loring, & Braley, JJ., and afterwards was submitted on briefs to all the justices.

J. Lowell, (G. McC. Sargent with him,) for Frederick A. Brigham, trustee.

H. C. Joyner, (T. H. Gage, Jr. with him,) for Frederick A. Brigham, executor.

W. Thayer, for Herbert A. Maynard, executor, filed a brief.

R. M. Morse, (C. E. Hellier with him,) for Edith Rice Morgan and Edwin L. Rice, appellees.

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### ISAAC H. FRANKS vs. ELIAS EDINBERG.

Worcester. September 29, 1903. — February 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

*Statute, Construction. Practice, Civil, Cross action against non-resident plaintiff, Appeal. Judgment, Set-off. Assignment.*

Where there is a substantial doubt as to the meaning of the language used in a compilation of statutes, the statute in question as it previously existed, especially when taken with a note of the commissioners indicating an intention to make no change, furnishes a valuable guide to the construction of the statute in its new form.

Under R. L. c. 170, § 2, the right to set off a judgment, of the nature described in the statute, by a cross action against a non-resident plaintiff, is absolute where there is only one defendant in the original action, and where there are several defendants may be permitted at the discretion of the court.

In an action by a non-resident plaintiff on a New York judgment, the defendant was allowed under R. L. c. 170, § 2, to set off a judgment against the plaintiff in a cross action brought here, but the Superior Court excluded from the set-off the costs recovered by the plaintiff in the New York court. The defendant



appealed from the order excluding the New York costs. The plaintiff did not appeal. It appeared that the plaintiff after bringing his action here had assigned his New York judgment. The plaintiff contended that the assignment was a bar to the set-off. *Held*, that the costs in the New York judgment were part of that judgment, and not being costs in the action brought here on that judgment should have been included in the set-off. *Held, also*, that the assignment by the plaintiff was no bar to the set-off, as nothing further appearing, it was assumed that the assignee took subject to the defendant's right to bring his cross action under the statute and have the judgment set off, and therefore the court found it unnecessary to decide whether this point was open to the plaintiff on the defendant's appeal.

APPEAL from an order made in the Superior Court by *Gaskill, J.*, that in a set-off, under R. L. c. 170, § 2, of judgments recovered respectively by the plaintiff and the defendant in independent actions, there should be allowed to Franks as not subject to set-off the sum of \$92 recovered by him as taxable costs in an action against Edinberg in the State of New York.

The motion of Edinberg for a set-off of judgments was as follows: "Now comes the defendant and avers that since the finding by the court in the above entitled action in the plaintiff's favor the defendant has recovered in said court in an action against said Franks a judgment resulting in favor of the said Edinberg. Wherefore defendant Edinberg prays that the court will order and direct that the said judgments may be set off one against the other and execution may issue as will be then ascertained. But defendant Edinberg is content that the taxable costs, strictly so called of \$47.12 may first be taken out of the sum held by the trustee in the suit of *Franks vs. Edinberg*, before the set-off is made of the said Massachusetts judgment."

The order of the judge was as follows: "Ordered that out of funds in hands of Trustee taxable costs, viz.: 92.42 + 47.12 amounting to \$139.54 shall be retained for attorney of Plff. in *Franks vs. Edinberg* — balance to be set off as prayed for."

Edinberg appealed from this order. Franks did not appeal.

By the agreed statement of facts in the case the following appeared:

In the action of *Franks v. Edinberg*, and a trustee, the Supreme Court for New York County on April 18, 1901, gave judgment for the plaintiff in the sum of \$139.29, debt or damages, and \$92.42 costs, \$231.71 in all. On April 18, 1902, this judgment was assigned to one Benjamin. On March 1, 1902, the present

action was brought on this judgment in the Central District Court of Worcester, and on December 17, 1902, the case was tried in the Superior Court on appeal. That court, sitting without a jury, found for the plaintiff in the sum of \$254.78. The costs were \$47.12 and the plaintiff had judgment for \$301.90.

The action of *Edinberg v. Franks* was brought in the Superior Court on December 27, 1902. The jury found for the plaintiff in the sum of \$275. The costs were \$17.87, and the plaintiff had judgment for \$292.87.

Franks contended, among other points, that R. L. c. 170, § 2, gave to the trial court only a discretionary power to allow the set-off of a judgment by cross action, and that the exercise of this discretion was not subject to revision.

The case was submitted on briefs at the sitting of the court in September, 1903, and afterwards was submitted on briefs to all the justices.

*R. Hoar & S. G. Friedman*, for Edinberg.

*G. S. Taft, E. I. Morgan & R. A. Stewart*, for Franks.

HAMMOND, J. Courts have the power at common law to set off judgments. This power is said to be vested in them "by virtue of their superintendence of all legal proceedings depending before them," and its exercise is at the discretion of the court. *Makepeace v. Coates*, 8 Mass. 451. *Ames v. Bates*, 119 Mass. 397.

But there are certain statutory provisions with reference to actions between a non-resident plaintiff and a resident defendant, and the question is whether the resident defendant is entitled to a set-off of judgments in a case like the one now before us.

By the original act giving to a resident citizen a special right to bring a cross action when sued by a non-resident, it is provided that when each of the parties "shall have obtained judgment against the other, upon the application of either party to the court which rendered such judgment against him or them, the said court is authorized and directed to offset the said judgment (excepting the taxable costs) against each other, and to cancel them so far as to leave only the balance of the largest judgment to be executed." St. 1823, c. 118, § 2. The right given by this statute was absolute. The commissioners upon the Revised

Statutes found this law still existing, and they dealt with the subject by reporting in Chapter 90 of the revision, three sections as follows:

"Sect. 44. When an action is brought in this state by any person who is not an inhabitant thereof, or who cannot be found therein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the first action; provided that the demand in the two cases be of such a nature that the judgment or execution in the one case can be lawfully set off against the judgment or execution in the other.

"Sect. 45. If there are several defendants in the original action, each of them shall be authorized to bring such cross action against the original plaintiff, and upon recovering judgment therein, he may, in the discretion of the court be allowed to set off his judgment against that which may be recovered against himself and his co-defendants, in like manner as if the latter judgment had been against himself alone."

Section 47, which is new, provides for continuances of the cases so as to enable the absent party to defend the action against him, and to enable either party to set off his judgment or execution against that which shall be recovered against him.

The legislative committee to whom the report of the commissioners was referred suggested no amendment to these sections; but the second section was amended by the Legislature by striking out the words "in the discretion of the court," and as thus amended the sections were enacted as Rev. Sta. c. 90, §§ 49, 50, and 52, and ever since have been in force. Gen. Sta. c. 126, §§ 2, 3, 5. Pub. Sta. c. 164, §§ 2, 3, 5. R. L. c. 170, §§ 2, 4.

It is plain from the remarks of the commissioners concerning these sections that they did not intend to change the law then existing by virtue of St. 1823, c. 118, or that the contrast in §§ 49 and 50 should be between two different cases of permissive set-off at the discretion of the court, but on the contrary they intended the contrast in those sections to be between the case where the defendant in the original action is the plaintiff in the cross action on the one hand, and, on the other hand, the case where there are several defendants in the original action and one or more cross actions are brought by them, and that in

the first case the right to set-off should be absolute and in the second it should be at the discretion of the court. While it is true that in the interpretation of a statute the question is not what was the meaning or intention of the commissioners who reported it, but what was the intention of the Legislature which passed it, and that when the construction of the statute is clear and consistent it cannot be controlled by the suggestions of the commissioners (*Baker v. Atlas Bank*, 9 Met. 182, 197; *Holbrook v. Bliss*, 9 Allen, 69, 76,) still, where there is a substantial doubt as to the meaning of the language used in a compilation of statutes, the statutes as they previously existed, especially when taken with a note by the commissioners indicating an intention to make no change, furnish a valuable guide to their construction. *Bent v. Hubbardston*, 138 Mass. 99, 100.

Considering the history of the provisions now found in R. L. c. 170, § 2, the evident intent of the commissioners by whom they were originally framed to make no change in the then existing law, the difference in the language of the two clauses when contrasted with each other and the reasons for the contrast, we are of opinion that as to the cases named in the first clause of the section the right to set-off of judgments is absolute except that taxable costs cannot be set off, while as to those named in the second clause the right is within the discretion of the court.

It is contended by the plaintiff that even if this be the true construction of the statute there should be no set-off in this case because of the assignment by himself of the foreign judgment on April 18, 1902, after this action was brought. Without inquiring or deciding whether this contention is open to him on this appeal, (see *Vinal v. Spofford*, 139 Mass. 126, 180; *Shepard v. Lawrence*, 141 Mass. 479, 481,) we think this position untenable. The demand upon which the judgment in the cross action was rendered accrued to the defendant more than two years before the assignment of the foreign judgment. His right to bring his cross action and have the two domestic judgments set off against each other accrued when the plaintiff sued out the writ in this present action. We cannot say as matter of law that the mere fact of an assignment of the demand of the original plaintiff to a third person after the bringing of a suit which gave the defendant a statutory right to bring a cross action with a view of

setting off a demand coeval with that on which he had been sued, would prevent the allowance of a set-off of the judgments. In the absence of anything but the mere fact of an assignment it seems equitable to say that the assignee took subject to the defendant's right to bring his cross action under the statute and have the judgments set off.

The result is that Edinberg was entitled to have the judgments exclusive of the costs upon the suits here set off against each other, and that the order of June 4, 1903, was erroneous in so far as it directed that out of the funds in the hands of the trustee there should be retained for the attorney of the plaintiff in this action the item of \$92.42, the amount of the costs forming part of the foreign judgment. The sum to be retained should be only \$47.12, the costs in this present action, the balance to be set off as prayed for.

*So ordered.*

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LOUIS E. CHESTER *vs.* GEORGE B. McDONALD & trustee.

Suffolk. November 11, 1903. — February 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Trustee Process. Assignment. Words, "Future earnings."*

The provision of Pub. Sta. c. 183, § 39, (R. L. c. 189, § 84,) that no assignment of "future earnings" shall be valid against a trustee process unless recorded, does not apply to an assignment of money to be received under a contract for the making and delivery of a chattel which does not require the personal services of the assignor.

The money to be received under a contract for making a granite monument, of a kind which the seller furnishes for the general market cut by his workmen from stone bought of quarrymen, is not earnings within the meaning of Pub. Sta. c. 183, § 39, (R. L. c. 189, § 84,) requiring an assignment of future earnings to be recorded to be valid against a trustee process.

CONTRACT on a promissory note for \$178 and interest, begun by a trustee process in which Elmer C. Willison was summoned as trustee. Writ in the Municipal Court of the City of Boston dated September 5, 1901.

The defendant was defaulted, and on June 25, 1902, the trustee

filed an answer showing funds in his hands amounting to \$121.38. On June 28, 1902, William Reynolds was admitted as an adverse claimant, claiming the funds in the hands of the trustee by virtue of an assignment.

On appeal to the Superior Court the case was tried before *Bond, J.*, without a jury. It appeared, that on July 8, 1901, Reynolds lent the defendant the sum of \$375, and received from the defendant a note for that amount and, as collateral security, the assignment above referred to. Reynolds received on account of the assignment, from persons other than Willison, the sum of \$150. At the date of the writ there was due to Reynolds from the defendant \$225 on account of the note and assignment. The assignment from the defendant to Reynolds never was recorded. It was dated July 8, 1901, and assigned to Reynolds the sums to be received under various orders for monuments, including "E. C. Willison \$199 # 23600." "The above to be paid to him until he has amount of note collected in full and then release."

The contract between the defendant and Willison was as follows: "March 9, 1901. Mr. George B. McDonald, Dear Sir, — You will please furnish me with one monument No. 23600, as per scale tracing attached, of the best grade of dark Quincy sound stock, well polished and free from all objectionable spots, knots, or other imperfections, with Lewis holes cut in all pieces requiring same. This work to be heavily boxed and strapped securely with iron, delivered on cars at Quincy, as we may direct, on or before April 20th next, for which we will pay you \$185 (one hundred eighty-five dollars). Specifications as below. [Specifications.] Please use Field & Wilde's best dark stock in all pieces of this order to match, have the work first class in every way, and ready for shipment on or before above date. There will be an inscription which will be sent you later on. Yours truly, E. C. Willison."

"Quincy, March 16-01. E. C. Willison. Your order No. 23600, under date of March 9, received and accepted. Yours truly, Geo. B. McDonald."

The judge refused the claimant's requests for rulings, and ruled that the assignment from the defendant to Reynolds was an assignment of future earnings, and that not having been recorded it was invalid against the trustee process, and ordered

judgment for the plaintiff, with costs against the adverse claimant, and also that the trustee be charged in the sum of \$121.38. The claimant alleged exceptions.

*W. W. Jenness*, (*G. W. Abele* with him,) for the adverse claimant.

*J. T. Keen*, (*J. T. Auerbach* with him,) for the plaintiff.

**BRALEY, J.** It appears that the defendant was a maker of granite monuments for mortuary uses, buying the rough material from quarrymen and then fashioning the stone into the required form at his yard. No part of the work required to cut the stone into the finished monument was either done by him or especially under his direction, but the labor was performed by his workmen over whom when present he exercised a general superintendence, while in his absence they were under a "working foreman." It was understood by the buyer that the monument for which he contracted, and that actually furnished, was such as the defendant in the ordinary course of his business procured and made for the general market. The vendee was indifferent as to the person by whom the stone should be worked into the finished design, and the skill and personal services of the defendant were not engaged, and were not the subject of the contract.

The bargain was for the monument itself, and not specifically for the work that was necessary to prepare the stone, and put on the designated letters. *Bacon v. Parker*, 137 Mass. 309, 312.

While the word "earnings" used in St. 1865, c. 43, § 2, subsequently Pub. Sts. c. 183, § 39, now R. L. c. 189, § 34, is generally held to embrace wages, it is not to be limited to so narrow a restriction, but is broad enough to include money expended, and material furnished, as well as work to be done, or services rendered, under a contract which calls for both.

No personal services on the part of the defendant were required of, or given by him, or as a matter of legal right could be demanded from him, and this essential element is wanting. *Kendall v. Kingsley*, 120 Mass. 94.

The plaintiff relies on the cases of *Jenks v. Dyer*, 102 Mass. 235, *Somers v. Keliher*, 115 Mass. 165, and *Jason v. Antone*, 131 Mass. 534.

In the first case, the evidence apparently was sufficient to show,

that the defendant who kept boarders, did so in the usual way, and that her labor would form a part of the consideration of the contract between her and the trustees, and the case may well rest on this ground.

*Jason v. Antone* followed *Jenks v. Dyer*, and is somewhat similar as to its facts, and does not require further comment.

The case of *Somers v. Keliher* is fully reported, and an examination of the original papers does not disclose further details. But it is significant that the briefs of counsel rest the claim of the plaintiff on the ground of personal services, and the work under the contract might have been found, in part at least, to be the personal labor of Shaughnessy, the assignor.

If, however, these cases are to be considered as supporting the doctrine put forward by the plaintiff, that "future earnings" may be treated as including the price to be paid under any form of contract, that calls for the making or furnishing of a chattel, or the erection of a building that becomes annexed to and is a part of the land on which it is built, and into the making or construction of which no service, by way of manual labor, or of personal supervision, direction and control of the assignor enters, neither can be sustained.

In such a construction, the indispensable requirement of the statute found within the phrase "future earnings," which means payment for what the assignor himself is to earn, whether put as wages, for manual labor, or for personal services actually rendered, is absent. To bring an assignment within its provisions, it must be shown, that under a contract silent as to such details, the consideration to be paid to a contractor includes wages earned, and such as would be due to him, if employed to do the necessary work by the buyer of the finished article of merchandise, or of the owner of land on which the building is to be erected, and by whom in each instance the materials would be furnished, though it might also appear, that, in addition to his own labor, he had expended money for materials and the work of others necessary to be supplied to carry out his agreement.

If the contention of the plaintiff is adopted, then labor and services not contracted for as such, but which are performed by others than the vendor or contractor, as a means of making the chattel to be furnished, or constructing the building, would be-



come as to him personal wages, or earnings, an assignment of which, in order to be valid must be recorded, and the primary object of the statute is defeated.

We are of opinion, that the price to be paid for the monument furnished by the defendant to the trustee, is not "future earnings," an assignment of which must be recorded, in order to be valid against attachment by trustee process, and that the first and second rulings requested by the claimant should have been given.

*Exceptions sustained.*

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ROBERT M. SNYDER vs. JAMES M. SMITH & others.

Suffolk. December 14, 1903. — February 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Bankruptcy. Words, "Lien."*

A temporary injunction, upon a bill under Pub. Sts. c. 151, § 2, cl. 11, to reach and apply equitable assets of the defendant in payment of his debt to the plaintiff, issued more than four months before the defendant is adjudicated a bankrupt, creates a lien good against the trustee in bankruptcy under the bankruptcy act of 1898.

BILL IN EQUITY, filed April 26, and amended May 8, 1901, under Pub. Sts. c. 151, § 2, cl. 11, to reach and apply certain equitable assets of the defendant Smith in the hands of the defendants Batt and Dickinson, trustees under the will of James M. Smith, the elder, and the interests of the defendant Smith under a legacy in the hands of the defendant Henderson.

On May 15, 1901, the Superior Court issued a temporary injunction, restraining the defendants Batt and Dickinson and the defendant Henderson from assigning, transferring or paying over any portion of the money, securities or property in their hands belonging to the defendant Smith, until further order of that court, and restraining the defendant Smith from selling, transferring or assigning his interest therein until further order of that court. This injunction was still in force as modified by the decree of March 27, 1903, mentioned in the opinion.

This case, with two others, was referred to a master, who on

March 16, 1903, filed his report establishing the claims of the plaintiffs against the defendant Smith, and finding that the defendants Batt and Dickinson had money and securities of the defendant Smith to the face value of \$44,000, and that the defendant Henderson had a life estate in the legacy in question of which a fraction belonged to the defendant Smith.

On March 27, 1903, a decree was entered for the plaintiff as stated in the opinion. The defendant Smith appealed.

On May 7, 1903, the defendant Smith was adjudicated a bankrupt by the District Court of the United States for the District of Massachusetts. On May 7, 1903, the plaintiff, after notice, filed a motion to dismiss the appeal for want of prosecution.

On May 21, 1903, D. Frank Kimball, Esquire, was appointed trustee in bankruptcy of the defendant Smith, and on May 26, 1903, qualified as such trustee. On June 6, 1903, Kimball, trustee in bankruptcy, filed an intervening petition.

This petition and the motion to dismiss the appeal of the defendant Smith were heard by *Hardy, J.*, who allowed the motion to dismiss the appeal, and denied the prayers of the petition, except that Kimball, trustee, was allowed to become a party to this proceeding, only for the purpose of receiving any surplus that might remain after the debts to the plaintiff and the plaintiffs in the other suits had been paid. The trustee in bankruptcy alleged exceptions.

*G. M. Palmer & H. T. Richardson*, for the trustee in bankruptcy.

*H. R. Bailey, (F. M. Ives with him,)* for the plaintiff.

KNOWLTON, C. J. The motion to dismiss the appeal of the defendant James M. Smith for want of prosecution and the petition of Kimball the trustee in bankruptcy to be allowed to intervene in the suit were heard together. The motion was allowed, and the petition was denied except so far as it related to any surplus that might remain after the debts of the various parties had been paid. At the hearing the plaintiff filed requests for rulings, all of which were given by the judge. One of these was that under the bankruptcy act of 1898 the creditors who were parties to this suit "obtained good equitable liens valid as against the trustee in bankruptcy" of the defendant Smith. We infer that the decision of the judge both upon the motion

and the petition was founded largely, if not entirely, upon his ruling made in accordance with this request, and was not made merely as a matter of discretion. The trustee in bankruptcy legally represented the bankrupt as the assignee of his property, and was entitled to be heard, upon proper proceedings in court, on his claim to the property referred to in the decree. We shall therefore assume in his favor, against the plaintiff's contention, that he is rightly before us on his exception to the order denying his petition, and upon his appeal from that order.

The important question in the case is whether the proceedings gave the plaintiff an equitable lien upon the assets mentioned in the bill, which was good against the trustee in bankruptcy. The suit was brought under Pub. Sta. c. 151, § 2, cl. 11, (R. L. c. 159, § 3, cl. 7,) to reach and apply certain equitable assets of the defendant Smith in the possession of the defendants Batt and Dickinson, trustees. A temporary injunction was issued on May 15, 1901, soon after the commencement of the suit, restraining the defendant Smith and the defendants who held the property from disposing of it. On March 27, 1903, a decree was entered settling the rights of the parties in favor of the plaintiff; the defendant Smith appealed, but failed seasonably to prosecute his appeal, and on May 7, 1903, he was adjudicated a bankrupt on his voluntary petition; and on May 21, Kimball was duly appointed his trustee.

The United States bankruptcy act of 1898, at § 67 *c* and § 67 *f*, in differing language recognizes liens "created by or obtained in or pursuant to any suit or proceeding at law or in equity," and liens "obtained through legal proceedings." The provisions of this section are somewhat broader than those of the bankruptcy act of 1867. They are unlike the insolvency law of Massachusetts. This law, as it is found in the Gen. Sta. c. 118, § 44, discharged all liens obtained in legal proceedings, unless the suit had gone to judgment and the lien by attachment had been perfected by a levy. It is expressly said that the assignment shall be effectual to discharge any attachment on mesne process, subject to a special exception permitting the attachment to be preserved in certain cases for the benefit of the general creditors. By the St. of 1880, c. 246, § 7, this statute was amended by adding a provision as follows: "The assignment named in section

forty-four of said chapter one hundred and eighteen shall not dissolve an attachment on mesne process, made more than four months prior to the time of the first publication of the notice of issuing the warrant, in case of voluntary proceedings; and in case of involuntary proceedings such assignment shall not dissolve such an attachment made more than four months prior to the time of the first publication of the notice of the filing of the petition." This provision has been embodied without material change in the Pub. Sts. c. 157, § 46, and in the R. L. c. 163, § 54. Until this amendment was made, the statute not only in express terms provided that the lien created by an attachment on mesne process should be ineffectual against the rights of the assignee, but declared by implication that equitable liens of a similar character, obtained through legal proceedings in the nature of an attachment, would not be enforceable in proceedings in insolvency. By the amendment an exception was made in favor of attachments on mesne process made more than four months before the commencement of insolvency proceedings, but there was no exception of equitable liens obtained in proceedings to collect a debt.

The first question under § 67 of the bankruptcy act is what is meant by the word "lien." It is plain that a lien created by a suit in equity stands as well as any other kind of lien. Such a lien that has been in existence more than four months is good against the assignment to the trustee. An attachment on mesne process under our statute creates a lien. *Davenport v. Tilton*, 10 Met. 320. *Taylor v. Mixer*, 11 Pick. 341, 348. *Denny v. Willard*, 11 Pick. 519, 524 *et seq.* In the first of these cases it is held that such a lien is preserved by the bankruptcy act of 1841. This lien does not depend upon possession; it is created by operation of law, sometimes by a record of the doings of the officer, as in the case of attachments of real estate, (see R. L. c. 167, § 59,) and of personal property that cannot easily be removed. See R. L. c. 167, § 45. Undoubtedly an attachment by trustee process gives a lien upon property which will be good against bankruptcy if more than four months old. *Kimball v. Morris*, 2 Met. 573, 578, 579.

Proceedings in cases like the present are often called in the books an equitable attachment. If the facts warrant it, it is the

practice to issue a temporary injunction, whereby the property, by judicial order, is charged with an equity for the security of the plaintiff, and is taken directly into the control of the court. In this respect the control of it and its appropriation for security are in all particulars as effectual as in an attachment at law by trustee process.

A bill brought under our statute is like a creditors' bill under general equity practice, though it may be brought by a single creditor for his own benefit without having obtained a judgment, and without making other creditors parties. That equitable liens upon property can be enforced when there is no other control of the property than by the process of a court of equity has been decided repeatedly in this Commonwealth. *Wiggin v. Heywood*, 118 Mass. 514. *Western Union Telegraph Co. v. Caldwell*, 141 Mass. 489. *Desmond v. Fisher*, 152 Mass. 521. The power of the court to appropriate property under this statute has been maintained effectually in a variety of cases. *McCann v. Randall*, 147 Mass. 81. *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 151 Mass. 515. *Pettibone v. Toledo, Cincinnati, & St. Louis Railroad*, 148 Mass. 411, 417. *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 149 Mass. 24, 27.

The trustee in bankruptcy relies upon *Trow v. Lovett*, 122 Mass. 571, *Squire v. Lincoln*, 137 Mass. 399, *Powers v. Raymond*, 137 Mass. 488, *Fish v. Fiske*, 154 Mass. 302, and *Titcomb v. Bradlee*, 159 Mass. 190, as tending to show that in this case there is no equitable lien which can be recognized under the bankruptcy act of 1898. The first of these cases was brought under the St. of 1875, c. 235, which confers jurisdiction in equity to reach and apply in payment of a debt property fraudulently conveyed by a debtor with intent to defeat, delay or defraud his creditors. The question arose under the bankruptcy act of 1867. The bill was filed in February, 1876, and in March, 1876, the debtor was adjudicated a bankrupt. The property might have been attached by the plaintiff in an action at law. No injunction was issued. If an attachment at law had been made, it would have been dissolved, because it would have been less than four months old. The statute gave no greater effect to an equitable attachment than to an attachment at law. While some of the language of the opinion is not in accord with that of some

other courts, the decision was plainly right, and the case is not an authority against the plaintiff under the bankruptcy act of 1898. The decision in each of the next two cases was simply that the right acquired by a plaintiff in equity under this statute was not an attachment that could be kept in force by the assignee for the benefit of general creditors under the Pub. Sts. c. 157, § 47. The last two cases arose under the insolvency law of this Commonwealth, and, as we have already pointed out, this law defeated liens legal and equitable obtained through legal proceedings to collect a debt, except attachments on mesne process, which means attachments at law, that were made more than four months before the commencement of insolvency proceedings. These cases do not decide that the lien referred to is not an equitable lien in the general sense, but that it is not a lien which will be given effect against an assignee in insolvency under the insolvency law of Massachusetts.

The cases of *Metcalf v. Barker*, 187 U. S. 165, and *Pickens v. Roy*, 187 U. S. 177, fully cover the question now before us, unless the fact that the bill in each case was brought by a judgment creditor made a decisive difference in regard to the result reached. *Doyle v. Heath*, 22 R. I. 213, 219, and *Taylor v. Taylor*, 14 Dick. 86, 89, are to the same effect. We are of opinion that there is no such difference in principle between the rights secured by a creditor's bill brought under our statute with an injunction in favor of the plaintiff, and a bill brought by a judgment creditor, as should require us to hold that one plaintiff acquires no lien, while the other acquires a lien that is protected under the bankruptcy act. In either case the lien acquired is not like a lien at law, which must be maintained by possession, but it is an equitable right, to be held as security and protected by the order of the court.

The St. 1892, c. 209 (R. L. c. 177, § 24), enacted since the decision in the latest of the Massachusetts cases above cited, expressly gives a lien that will be enforced against an assignee or trustee in proceedings in insolvency or bankruptcy in cases like the present. This statute seems to make the matter clear.

We are of opinion that the ruling was right. The form of the decree is not before us for consideration.

*Exceptions overruled; order affirmed.*

## COMMONWEALTH vs. GRANVILLE L. PACKARD.

Plymouth. December 16, 1903. — February 24, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Nuisance. License. Naphtha.*

An indictment charging the defendant with storing between certain dates large quantities of naphtha on premises kept and maintained by him for the purpose, near private houses and public highways, by reason whereof great quantities of offensive, noxious and unwholesome smells were emitted and impregnated the air, making it unhealthy, is good as an indictment at common law for maintaining a nuisance.

A license under St. 1894, c. 399, (R. L. c. 102, §§ 114, 115,) permitting the storage of naphtha in a certain building, is admissible in evidence on the trial of an indictment at common law for maintaining a nuisance by the storage of naphtha there during the period covered by the license, and proof of compliance with the terms of the license is a defence.

INDICTMENT, found on February 10, 1902, for maintaining a nuisance at common law.

The indictment was as follows: "The Jurors for the Commonwealth of Massachusetts on their Oath present, that Granville L. Packard of Brockton in the County of Plymouth, on the first day of October, in the year of our Lord one thousand nine hundred and one, and on divers other days between said first day of October and the date of the finding of this indictment, at Brockton, in the County of Plymouth, near dwelling houses occupied by divers citizens of the said Commonwealth, and also near divers public highways and divers ways commonly and lawfully used by divers citizens of the said Commonwealth, said public highways and ways being then and there situate, then and there did keep and maintain a building and premises for the storage of, and did store, a large quantity of naphtha; by reason whereof large quantities of offensive, noxious and unwholesome smells on the days aforesaid then and there were emitted, and the air thereabouts on the days aforesaid was greatly filled and impregnated with said offensive noxious and unwholesome smells, and was corrupted and rendered unhealthy, to the great damage and common nuisance of all the citizens of

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said Commonwealth there being and residing and passing and repassing through the said public highways and ways; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

At the trial in the Superior Court before *Bell, J.*, a motion to quash the indictment was overruled by the judge. The jury returned a verdict of guilty; and the defendant alleged exceptions, raising the questions stated in the opinion.

*C. C. King*, for the defendant.

*Asa P. French*, District Attorney, for the Commonwealth.

**BRALEY, J.** A motion to quash the indictment was denied, and after a verdict of guilty, the defendant brings his case to this court on exceptions to the order overruling his motion; to the refusal to admit the license in evidence offered by him at the trial, and to give certain rulings requested; and to the instructions under which the case was submitted to the jury.

These questions, so far as they become material to our decision, may be considered in their order.

The motion to quash was rightly overruled, as the offence is described and pleaded with technical precision, and the indictment was sufficient in form. *Commonwealth v. Perry*, 139 Mass. 198.

A more important question is presented by the exclusion of the license.

By St. of 1894, c. 399, § 1, it was made a misdemeanor for any person to erect, occupy or use a building for the "storage, keeping, manufacture or refining of crude petroleum, or any of its products", in any city or town, without a license therefor being first obtained from the mayor and aldermen or the selectmen.

In the exercise of the police power the Legislature may pass such laws as are reasonable, for the regulation of the internal affairs of the State, and it is now well settled, that by such enactments it can prohibit acts, which at common law were not classed as noxious in themselves, because their existence did not constitute a nuisance. *Rideout v. Knox*, 148 Mass. 368, 372. *Quincy v. Kennard*, 151 Mass. 563. It can also declare that acts which might be unlawful, if carried to excess, by reason of their general tendency to annoy, and injure others, may be lawfully done, upon such conditions as it may prescribe. *Sawyer v. Davis*,



186 Mass. 239, 244. *Commonwealth v. Parks*, 155 Mass. 531. *Transportation Co. v. Chicago*, 99 U. S. 635.

"A nuisance at common law may consist in the keeping or manufacture of gunpowder, naphtha, or other explosive or inflammable substances in such quantities and places or in such a manner as to be dangerous to the persons and property of the inhabitants of the neighborhood. . . . It may also consist in the carrying on of any trade or business in such a manner as to emit offensive odors and stenches, either injurious to the health of the public, or making the occupation of neighboring dwelling-houses uncomfortable and disagreeable." *Commonwealth v. Kidder*, 107 Mass. 188, 192.

But if the legislative sanction is given to such acts that otherwise would be deemed a nuisance, they cease to be such when properly exercised within the terms of the license which authorizes and permits them. *Commonwealth v. Boston*, 97 Mass. 555. *Badger v. Boston*, 180 Mass. 170. *Aldworth v. Lynn*, 153 Mass. 53. *Bacon v. Boston*, 154 Mass. 100. *White v. Kenney*, 157 Mass. 12, 13. *Taft v. Commonwealth*, 158 Mass. 526, 547, 548.

Where a nuisance of the kind described in the indictment affects the enjoyment of property, or the health of an individual, or of comparatively a few persons in the community, it is said to be private in its nature, and the remedy of those injured is by an action for damages, or a bill in equity, to enjoin its continuance. If, however, it is so general in its character, and the number of persons annoyed and injured are so large that the public generally are affected, an indictment lies against those by whom it is caused and maintained. *Harvard College v. Stearns*, 15 Gray, 1, 5, and cases cited.

In either case, the act complained of is a nuisance, and whether it shall be deemed public or private may depend on the extent of the annoyance caused, and if a license to carry it on is shown, a civil suit for damages or for an injunction cannot be maintained, unless it appears that the licensee had not conducted the business within the conditions of his license, or has managed it in an improper or negligent manner. *Call v. Allen*, 1 Allen, 137, 143. *Murtha v. Lovewell*, 166 Mass. 391.

The mayor and board of aldermen were given full authority

by the statute, to act upon the application of the defendant. In order that all persons should be protected who might be interested, either as owners of property or residents in the vicinity where the business to be licensed was to be located, no license could be issued to him until after ample notice had been given to them, and they had an opportunity to be fully heard in remonstrance to its being granted, or to suggest limitations, under which he might be permitted to use his premises for this purpose.

It was within the power of the tribunal designated, after having heard all parties interested, to pass upon and determine whether a license should be issued, and it could either grant or refuse the application. No appeal lay from their decision, and the intention of the Legislature is plain, that after giving due consideration to those who might be inconvenienced and annoyed, and also having a proper regard for the general good order and welfare of the community, their judgment to the extent of the authority conferred is to be treated as a final determination of the rights of the parties interested.

Legislation of the class to which this act belongs has been upheld too often for it to be open to the objection that it is unconstitutional, by reason of an improper or unreasonable exercise of legislative power, and there is nothing to prevent giving full legal effect to its purpose, that persons duly licensed can store, and keep on their premises, naphtha, or any other product of crude petroleum, even if the keeping of them without such permission would create a nuisance at common law. *Commonwealth v. Plaisted*, 148 Mass. 375, 382, 383, 385. *Commonwealth v. Boston*, *ubi supra*.

Though the storage of the quantity disclosed by the evidence might cause noisome smells that became obnoxious to the community if the amount kept and the method of storing were reasonable and proper, and in accordance with the defendant's license, he is not either civilly or criminally liable therefor. *White v. Kenney*, *ubi supra*.

To so much of the indictment as charged the offence from October 1, 1901, to November 25, 1901,\* his license would not be a protection, if otherwise his acts were sufficient to prove the commission of any crime.

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\* The date of the license offered in evidence by the defendant.

But during the remainder of the time it was competent for him to prove that he had been duly authorized to use his premises for this purpose, and the license granted to him was admissible in evidence.

It becomes unnecessary to consider the other questions presented, as they may become immaterial at another trial.

*Exceptions sustained.*

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NATHANIEL THAYER & another, trustees, vs. FRANCIS  
H. DEWEY, guardian *ad litem*.

Worcester. January 5, 1904. — February 24, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND & LORING, JJ.

*Trust, Duties of trustee as to investments.*

In this Commonwealth the only rule as to the duty of trustees in making investments is that they should act in good faith and exercise a sound discretion. Although the investment of trust funds in the purchase of real estate in another State would not be the exercise of a sound discretion by trustees without some good reason to justify the investment, yet where the trust fund is very large and only a small part of it is invested in such real estate, and where it is found expressly that the investment "will not cause any loss to the estate, and that the trustees acted in good faith and with sound discretion", an appeal from a decree allowing the investment in an account of the trustees will not be sustained.

APPEAL from a decree of the Probate Court for the county of Worcester allowing a certain item in an account of the trustees under the will of Nathaniel Thayer, late of Lancaster.

At the hearing of the appeal before *Braley, J.*, the appellant relied solely on the ground that the trustees had no legal right or power to invest the funds of the trust in real estate outside of the Commonwealth, and asked the justice to rule that for this reason the investment should be disallowed. The justice refused to rule as requested, and ordered a decree to be entered affirming the decree of the Probate Court. At the request of the appellant, he reported the case for determination by the full court, such decree to be entered as law and justice might require.

*F. H. Dewey*, guardian *ad litem*, *pro se*.

*R. Olney & J. R. Thayer*, for the trustees.

KNOWLTON, C. J. The trustees in this case invested more than \$200,000 in the purchase of real estate in Chicago, and the question is whether this investment shall be allowed in their account.

The rule in this Commonwealth governing trustees in making investments has often been stated and is well established. They are bound to act in good faith and to exercise a sound discretion. *Harvard College v. Amory*, 9 Pick. 446. *Amory v. Green*, 13 Allen, 413. *Brown v. French*, 125 Mass. 410. *Bowker v. Pierce*, 130 Mass. 262. *Hunt, appellant*, 141 Mass. 515. *Dickinson, appellant*, 152 Mass. 184. *Pine v. White*, 175 Mass. 585. *Green v. Crapo*, 181 Mass. 55.

The appellant contends that an investment in real estate outside of the Commonwealth should not be sustained unless, first, the trust funds are so invested when they come into the custody of the trustee, in which case he may be justified in retaining the investment; second, the will authorizes or instructs the trustee to make such an investment; third, in certain rare and exceptional cases when such an investment may be necessary or required to protect or secure other investments or interests involved in the trust fund. The rule in some other States is substantially in accordance with this contention. *Ormiston v. Olcott*, 84 N. Y. 339. *Rush's estate*, 12 Penn. St. 375, 378. *Ex parte Copeland*, Rice Eq. (S. C.) 69. *McCullough v. McCullough*, 17 Stew. (N. J.) 313. But in these States trustees are limited more strictly in their power to make investments than they are limited by our rule in Massachusetts. In *Amory v. Green*, 13 Allen, 413, trustees were authorized to invest in real estate for a homestead for the *cestui que trust* in another State, because the authority given by the will was broad enough to justify it. In many other cases investments in stock and bonds of great corporations organized and doing business in other States have been approved, where it appeared that the investment was made in good faith, and in the exercise of a sound discretion, according to the standard of other men of prudence, discretion and intelligence in the management of their own affairs in regard to the permanent disposition of their funds with a view to prob-

able income as well as the probable safety of the capital to be invested. In these cases the stocks and bonds were such as are often sold, and have a recognized market value, away from the place where the corporation is established or where its property is located.

There is a grave objection to the investment of a trust fund in the purchase of real estate in a foreign State, where the property is beyond the jurisdiction of our courts and is subject to laws different from our own. On this account it would not be within the exercise of a sound discretion to make such an investment without some good reason to justify the choice of it. Ordinarily it is very desirable that investments which have a local character, like the ownership of real estate, should be within the jurisdiction of the court that controls the trust. But in this Commonwealth there is no arbitrary, universal rule that an investment will not be approved if it consists of fixed property in another State.

In the present case it is said that the trust fund is very large, and that this is but a very small part of the whole, and it is expressly found that the investment "will not cause any loss to the estate, and that the trustees acted in good faith and with sound discretion." The only objection made at the hearing was that the trustees had no legal right to make an investment in real estate located outside of the Commonwealth. The appellant's contention, if sustained, would call for the establishment of an arbitrary rule which is inconsistent with the general rule as to trustees' investments heretofore existing in this Commonwealth.

*Decree of Probate Court affirmed.*

**MARGARET BURNS vs. JAMES DONOGHUE.**

Hampden. September 23, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Bastardy. Practice, Civil, Charging jury.*

In a bastardy process under R. L. c. 82, the complaint was made in a lower court before the child was born, a supplemental complaint being filed in the Superior Court after the birth of the child, and it did not appear that the complainant had made any accusation before that contained in the complaint to the magistrate. The complainant was asked whether "from the first" she had accused the defendant of being the father of the child, and said that she had, and the complainant's mother was asked whether she ever had heard her daughter accuse any person other than the defendant of being the father of her child, and said that she had not. *Held*, that the words "from the first" must be taken to refer to the accusation made before the magistrate, and that there was no error in admitting the evidence to show constancy in accusation, for the purpose of laying a foundation for the admission, under § 16 of the statute, of an accusation by the complainant in the time of her travail which subsequently was testified to by the complainant and her mother.

An illustration in the charge of a presiding judge in a bastardy case, to show that a complainant might be believed as to the material facts in such a case without the jury accepting her whole story, was held to give no ground for exception, where there was nothing which fairly could be construed as manifesting an intention on the part of the judge to give his own opinion as to the credibility of the witness.

COMPLAINT for bastardy under R. L. c. 82, signed and sworn to in the Police Court of Holyoke on February 4, 1902. Supplemental complaint filed in Superior Court on October 28, 1902.

At the trial in the Superior Court before *Mason*, C. J., the jury returned a verdict of guilty; and the defendant alleged exceptions.

The illustration in the judge's charge excepted to by the defendant was the second of the illustrations contained in the following portion of the charge: "Now, it is not true that because a witness is inaccurate as to some of the circumstances and incidents connected with the story, the story is necessarily false as to the main fact. Illustrations might be given without number, of this principle. If one of your friends tells you that

185	71
186	1168
185	71
188	387

he has been fishing and proceeds to tell you how many fish he caught, and what they weighed, you may distrust somewhat the accuracy of his count, or the correctness of his scales, without disbelieving the main fact that he went fishing. The weight or significance of such discrepancy is always a question of fact. It may be such as to induce distrust of the whole story, but it is not necessarily so.

"Now, in further illustration, any one having experience in this kind of a case, knows that it is a very common thing for the complainant to cling to the story that she was forced, that the connection by which the child was begotten, was, in fact, a rape. Now jurors, in finding a defendant guilty, do not always accept that portion of the story. The obvious explanation of the reluctance of a complainant to admit that the connection was voluntary, furnishes ordinarily all the explanation that would be required with reference to a statement of that kind, and the jury might well, and in many instances undoubtedly have, accepted the truth of the main statement without accepting as perfectly accurate, the recital of how it took place. But all this is a matter of fact for you to weigh as men of common experience in the world. You are to test the stories and determine what is true. The issue before you is simply as to the paternity of the child, not whether all that has been said about it is true, but whether, on the whole testimony, it is clear that this defendant is the father of this child. If he is, there should be a verdict of guilty; if you are not satisfied on this point, there should be a verdict of not guilty."

The case was submitted on briefs at the sitting of the court in September, 1903, and afterwards was submitted on briefs to all the justices.

*C. T. Callahan*, for the defendant.

*J. R. Callahan*, for the plaintiff.

MORTON, J. This is a bastardy complaint. There was a verdict of guilty and the case is here on exceptions to the admission of testimony, and to the charge.

1. The first exception was to the admission of the question put to the complainant, "Now, from the first, have you accused Donoghue of being the father of the child?" To which the witness answered, "Yes, sir, I have." The question and the answer

were admitted subject to the defendant's exception to show constancy of accusation. The next exception was of a like nature. The complainant's mother was asked if she had ever heard her daughter accuse any other person than the defendant of being the father of the child and she said that she had not. This question and answer were also admitted as tending to show constancy. It appeared that a complaint was made in the lower court before the child was born and that a supplemental complaint was filed in the Superior Court after the birth of the child. The statute provides that, "If, upon examination under the provisions of section one and also in the time of her travail, she accuses the same man of being the father of the child of which she is about to be delivered, and continues constant in such accusation, her accusation in time of travail may be put in evidence upon the trial to corroborate her testimony." R. L. c. 82, § 16. That is, as we construe the statute, if the complainant has in the time of her travail accused the same man of being the father of her child whom she accused in the examination before the magistrate, and has continued constant in such accusation from the time of such examination, her accusation in time of travail may be put in evidence. In the present case, it is plain, that the testimony that was objected to was introduced for the purpose of laying a foundation under the statute for the introduction of the accusation in time of travail by the complainant which was subsequently testified to by herself and her mother. There was nothing to show that the complainant had made any accusation prior to that contained in the complaint to the magistrate, and the words "from the first" in the question that was put to her and objected to must be taken to refer to the accusation thus made. For the same reason, namely, that there was nothing to show that the daughter had ever made any accusation against anybody before that contained in the complaint, it cannot be said that the question to and answer of the mother were wrongly admitted.

2. The remaining exception relates to an illustration that was used in the charge, and the objection is that what was said constituted a charge upon the facts. The illustration was used for the purpose of directing the attention of the jury to considerations which as men of the world they might properly take into account as bearing on the credibility of the story told by the



complainant of the circumstances under which as she claimed the child was begotten. There was nothing which could fairly be construed as manifesting an intention on the part of the Chief Justice to throw into the scale on one side or the other the weight of his opinion on the question of credibility, which is what the statute was designed to prevent. See *Cook v. Bartlett*, 179 Mass. 576, 580; *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485, 488; *McKean v. Salem*, 148 Mass. 109, 114; *Commonwealth v. Clifford*, 145 Mass. 97; *Commonwealth v. Hayes*, 114 Mass. 282; *Morrissey v. Ingham*, 111 Mass. 63; *Harrington v. Harrington*, 107 Mass. 329; *Durant v. Burt*, 98 Mass. 161, 168. A majority of the court think that the exceptions on this branch of the case also should be overruled.

*Exceptions overruled.*

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### HARRY W. SMITH vs. ÆTNA LIFE INSURANCE COMPANY.

Worcester. September 30, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

#### *Insurance, Accident.*

Under an accident insurance policy insuring a cotton manufacturer against injuries not caused by "voluntary exposure to unnecessary danger" the assured cannot recover for an injury received while riding in an amateur steeple chase. *Seem*, otherwise of an injury incurred while engaged in an ordinary sport or amusement.

MORTON, J. This is an action to recover indemnity under an accident insurance policy for injuries received by the plaintiff while engaged in riding a steeple chase. The case was heard by a judge of the Superior Court upon agreed facts, and the judge found and entered judgment for the defendant and the plaintiff appealed.

The policy in suit is a renewal policy and expired June 6, 1901. The accident occurred June 1, 1901. The original policy was issued in 1895, and ran for one year. There were successive renewals from year to year as each expired. In the application on which the original policy was issued the plaintiff's

occupation was stated to be that of a cotton manufacturer. The application required that the "occupations" of the applicant "should be fully stated." In the policy the plaintiff was described as "a cotton manufacturer by occupation." Amongst the conditions on which the policy was issued was one that the policy should not cover injuries caused by "voluntary exposure to unnecessary danger." On May 28, 1901, the defendant learned that the plaintiff engaged in steeple chase riding, and directed its agent in Worcester to cancel the plaintiff's policy on the ground that it could not assume that hazard or take the chance of a claim. Thereupon the defendant's agent sent a check for the unearned premium to the agents through whom the plaintiff had procured the policy and to whom he had paid the premiums, with a request to notify the plaintiff that the policy had been cancelled and to return it. The plaintiff was absent from the city, and his bookkeeper opened the letter containing the notice and check, and after communicating with the agents through whom the plaintiff had obtained the policy, and being assured by them that it would be all right to do so, delivered up the policy. There was a provision in the policy giving the defendant the right to cancel it upon returning the unearned premium. Upon being informed as to what had taken place in his absence the plaintiff repudiated what had been done, and notified the defendant that he held the check subject to their order.

There are two questions before us: First, Whether the plaintiff's injuries were received in consequence of a voluntary exposure to an unnecessary danger within the meaning of the policy, and, secondly, Whether the policy had been duly cancelled before the accident.

We do not find it necessary to consider whether the policy had been duly cancelled, as we are of opinion that there was a voluntary exposure to unnecessary danger. Steeple chase riding, as commonly understood, differs from ordinary riding and driving and involves elements of unusual hazard and danger. There can be no question that the danger was unnecessary and that the exposure to it was voluntary. There was nothing in the description of the occupation of the plaintiff contained in the policy nor in anything else contained in the policy which included steeple chase riding or which showed that the plaintiff engaged

in it. We do not mean to say that an accident policy containing a provision like that contained in the policy in this case against voluntary exposure to unnecessary danger debars the insured from recovery if injured while engaged in the common sports and amusements. But in steeple chase riding, the liability to accident is much greater than in the ordinary sports and amusements. The fact that the race in which the plaintiff was injured was for amateurs makes no difference. Neither does the circumstance that the defendant's agent was aware that the plaintiff occasionally rode steeple chase races make any difference. The liability of the defendant depends on the terms of the policy and whether an accident sustained in steeple chase riding comes within them. For reasons already given we do not think that it does.

*Judgment affirmed.*

*T. H. Gage, Jr., for the plaintiff.*

*H. H. Fuller, for the defendant.*

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JOHN GAUGES vs. FITCHBURG RAILROAD COMPANY.

Franklin. October 19, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Negligence, Employer's liability.*

A railroad company is not liable to a section hand in its employ for an injury from being struck in the eye by an old spike which flew up when struck with an old hammer by a second foreman of the railroad company, if the company furnished plenty of good spikes and good hammers, especially where it does not appear that either the old spike or the old hammer was defective.

TORT, by a section hand employed on the railroad of the defendant, for personal injuries from being struck in the eye by a spike which flew up when struck with a hammer by a second hand or second foreman of the defendant, while he and the plaintiff were engaged in laying rails on the section of the defendant's railroad between Orange and Wendell. Writ dated October 16, 1899.

The declaration contained counts at common law and under St. 1887, c. 270, but contained no allegation that notice of the time, place and cause of the injury was given to the defendant, and at the trial there was no evidence of such notice. In the Superior Court the case was tried before *Fessenden, J.*, who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

*C. A. Parker & H. C. Attwill*, for the plaintiff.

*D. Malone*, for the defendant.

MORTON, J. If it was negligence on the part of Brooks to use an old spike and an old hammer, and the plaintiff's injury was caused thereby, nevertheless the defendant is not liable. The uncontradicted testimony shows that the defendant furnished plenty of good spikes and good hammers. The negligence, therefore, if there was any, in the use of an old spike and an old hammer, was the negligence of Brooks and not of the defendant. But there is nothing to show that the spike was not a good spike or that it was negligent to use it. It cannot be said that the use of old spikes constituted of itself negligence on the part of the defendant. An old spike might be as good for certain kinds of work as a new one. And according to the plaintiff's own testimony the orders were to use only the good ones. So as to the hammer,—notwithstanding the declarations of Brooks testified to by the plaintiff, there is nothing to show that the hammer was not a proper hammer for a person of the skill and experience of Brooks to use. The testimony tended to show that it was still a good hammer, although somewhat worn, and that Brooks continued to use it until he left nearly a year after.

*Exceptions overruled.*

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186	514
185	78
194	430

JAMES H. GAVIN vs. FALL RIVER AUTOMATIC TELEPHONE  
COMPANY.

Bristol. October 26, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Negligence, Employer's liability.*

In an action by a workman against a telephone company, for injuries from the plaintiff's hand being drawn into a snatch block while he was assisting in setting poles of the defendant, it appeared, that the plaintiff was forty years of age but had not handled ropes before, that he was ordered by a foreman to take in the slack of the rope of a derrick used for setting the poles, that he placed his hands on the rope two feet or more from the block, when the foreman said "go ahead" and a pair of horses attached to the rope on the other side of the block started, drawing the plaintiff's hand against the block. *Held*, that the danger was an obvious one, of which it was not the duty of the defendant to give the plaintiff information or warning, *also*, that the plaintiff was negligent in not seeing the block or, if he saw it, in not appreciating the danger, or, if he appreciated the danger in continuing to grasp the rope after the order was given for the horses to go ahead.

TORT, under the employers' liability act, for injuries received by the plaintiff from having his right hand drawn into a snatch block while assisting in setting poles of the defendant on Rodman Street in Fall River. Writ dated September 23, 1901.

At the trial in the Superior Court before *Lawton, J.*, it appeared that the notice required by the statute was given to the defendant, and that the accident happened at half past one in the afternoon of August 13, 1901, while the plaintiff was working under the direction of one Murphy, who, it was agreed, was a superintendent within the meaning of the employers' liability act. For the purpose of setting poles the defendant used a low gear or wagon on which a derrick was placed. Attached to the derrick was a fall which was hooked to the pole to be set. The derrick was on the rear end of the wagon and the rope from the fall led through a block at the top of the derrick, thence through a snatch block fastened to the rear end of the wagon, and then was led forward and a pair of horses was attached to it, so that the horses could raise the pole to a sufficient height to be set in the ground. During the morning

the plaintiff had been working with a pike. After dinner, when the men started to work, the plaintiff took the pike which he had been using during the morning. Murphy, foreman of the gang, told the plaintiff to lay down the pike and get hold of the rope, which the plaintiff did. Murphy was standing on one side of the rope and told the plaintiff what to do, giving him the rope in his hand. The plaintiff testified "He told me to pull down on the rope, take in the slack." The plaintiff was about two feet from the end of the wagon. He had not seen the snatch block until he was hurt. He took hold of the rope and pulled down. The plaintiff further testified "Murphy hollered out to go ahead and I pulled down on the rope, and at the time he hollered to go ahead the horses gave a plunge and I was knocked against the end of the gear and another man knocked up against me. My hand was drawn into the block."

At the close of the evidence the judge refused to order a verdict for the defendant. The jury returned a verdict for the plaintiff in the sum of \$2,200; and the defendant alleged exceptions.

*R. P. Borden*, for the defendant.

*E. Higginson*, for the plaintiff.

BARKER, J. The plaintiff was stationed near a snatch block, and his duty was to help pull toward the block a rope which led from it to a telephone pole about to be raised. The power to be applied to raise the pole was that of a pair of horses which were at one end of a low wagon on which was a derrick. The snatch block was at the other end of the wagon. The plaintiff stood with his hands on the rope two feet or more from the block. When an order was given for the horses to go ahead the rope was drawn through the block toward the wagon, thus tending to bring the hands which were grasping the rope toward the block. When the horses started the plaintiff and the man who was next him and also grasping the rope, but farther from the block than the plaintiff, held on to the rope, the man next the plaintiff was pulled against him and the plaintiff's hand was drawn into the block.

The plaintiff was forty years of age, and although he had not handled ropes before that occasion, the whole apparatus was open to view and its arrangement and operation were so plain

that he cannot be allowed to recover on the ground that he did not know that if he continued to grasp the rope after the horses started there was danger that his hand would be drawn into the block, or on the ground that it was the defendant's duty to explain to him that obvious danger and to warn him against it.

The plaintiff himself was negligent either in not seeing the block, or if he saw it, in not appreciating the danger, or if he appreciated it, in incurring it by continuing to grasp the rope after the giving of the order for the horses to go ahead.

If that order was too quickly given it nevertheless was an understood signal, and due care required that the plaintiff upon hearing it at once should let go of the rope.

*Exceptions sustained.*

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GEORGE C. GOODRUM vs. JOHN H. GRIMES.

Bristol. October 27, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Practice, Civil, Exceptions, New trial. Rules of Court.*

Rule 48 of the Superior Court, providing that, when further instructions are given in the absence of counsel after the jury have retired, the presiding judge may permit exceptions thereto at any time within twenty-four hours next following, is to enable counsel to ascertain what has passed in their absence and to give them an opportunity to except, and the time for taking an exception is not enlarged by the failure of counsel to ascertain what happened in their absence.

Rule 44 of the Superior Court requiring a motion for a new trial on account of any opinions or decisions of the judge, given in the course of the trial, to be filed within three days after verdict is returned, unless the time for filing such motion is extended by the judge, does not permit an exception to the denial of such a motion for a new trial filed after the three days.

Further instructions, in the absence of counsel, to a jury after they have returned a verdict which the judge considers imperfect in form, and still further instructions after the jury have been sent out for a second time and again have come into court, are "opinions or decisions of the judge, given in the course of the trial," within the meaning of Rule 44 of the Superior Court requiring a motion for a new trial to be filed within three days after the verdict is returned.

REPLEVIN, by a mortgagee of certain articles of personal property under a mortgage given by Patrick Grimes, of whose

estate the defendant was administrator, to secure the payment of certain notes. Writ dated April 21, 1900.

The trial, in the Superior Court before *Stevens, J.*, took the course stated in the opinion; and a verdict was entered for the defendant in the sum of \$638 in the manner there described. The plaintiff alleged exceptions.

*L. E. Wood*, for the plaintiff.

*J. M. Swift & J. A. Kerns*, for the defendant.

**BARKER, J.** The action is replevin for goods which had been mortgaged to the plaintiff by the defendant's intestate. It was committed to a jury who after retiring returned into court with two written verdicts, one for the plaintiff in the sum of \$500, the other for the defendant in the sum of \$638. The verdicts were in the usual way passed to the presiding judge, who after examining them returned to the jury the verdict in favor of the plaintiff, gave further instructions and again sent them out to consider further, the judge retaining the verdict in favor of the defendant. After some time the jury again returned and asked for further instructions, the foreman stating that from the evidence they were not able to find what was due the plaintiff on his notes. The judge instructed them that they were not to consider the notes. The foreman then asked if the amount of the notes would be deducted from their finding for the defendant. The judge replied that they were not to consider that. The foreman then said: "Then we have agreed upon our verdict, haven't we?" and the judge said, "I think you have," and thereupon the verdict for the defendant which the judge had retained, was passed to the clerk, and he asked the foreman and the jurors in the usual manner if that was their verdict, to which without further proceedings they assented and the verdict was recorded. When the jury first returned neither the plaintiff nor his counsel were in court. His counsel was in court when the jury returned the second time, and did not object to the proceedings nor except. Some two months or more afterwards the plaintiff moved for a new trial because the proceedings in returning the verdict were irregular and illegal, and upon the overruling of this motion the plaintiff excepted.

All the things now complained of were done in the course of the trial and before the verdict was returned, and all of them



were matters for exception if the plaintiff thought there was error. So far as they occurred after the jury had first retired and in the absence of counsel, the plaintiff had twenty-four hours under Rule 48, to ascertain them and except. So far as they took place in the presence of counsel his remedy was to except to them at the time, which was not done. The action of the presiding judge was an opinion or decision of the judge given in the course of the trial within the meaning of Rule 44. As the motion for a new trial was not filed within three days it could not be sustained because of the prohibition contained in Rule 44.

The fact that the plaintiff's counsel did not know until after the expiration of the time in which he might have excepted, that the paper verdict for the defendant was retained by the judge, if that course was error, which we do not intimate, gave him no right of exception to the overruling of his motion for a new trial made after the expiration of the time limited by Rule 44, because he had had an opportunity of excepting to that retention and did not except. *Commonwealth v. Morrison*, 184 Mass. 189. The twenty-four hours allowed in case counsel are absent when a jury returns after the case has been committed to them, are to enable counsel to ascertain what has passed in their absence, and give full opportunity to except. *McCoy v. Jordan*, 184 Mass. 575.

*Exceptions overruled.*



THOMAS W. CHISHOLM, executor, vs. NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Middlesex. November 10, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Negligence, Employer's liability.*

In an action against a telephone and telegraph company by a lineman in its employ, for injuries from falling from a pole of the defendant on which the plaintiff was at work, by reason of a pin which the plaintiff was grasping coming out of the pole, there was evidence that the hole into which the pin had been driven was bored so that it slanted downward instead of being on a level or slanting upward,

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188	494
185	82
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and that the pin was only driven in two and one half inches instead of four inches as there was evidence that it should have been. *Held*, that there was evidence to warrant a finding that there was a defect in the original construction of the pole for which the defendant was liable.

Whether a lineman in the employ of a telephone and telegraph company, when at work on a pole of his employer, is negligent in not examining a pin inserted in the pole before trusting his weight to it, is a question of fact for the jury, and this is none the less so by reason of a rule requiring linemen to test the poles and pins, if they thought there was danger, and if they found any loose pins to pull them out and report to the foreman, if it does not appear that the pin in question was loose or that the lineman thought there was danger.

In an action against a telephone and telegraph company by a lineman in its employ, for injuries from falling from a pole of the defendant on which the plaintiff was at work, by reason of a pin which the plaintiff was grasping coming out of the pole, the fact that linemen were required to drive the pins into the poles after the poles had been set and the holes for the pins bored, does not relieve the defendant from liability, if it does not appear that the plaintiff drove in the pin which came out, the linemen in driving in the pins acting as agents of the defendant for whose negligence it would be liable.

A lineman working on a telephone or telegraph pole of his employer does not assume the risk of an accident caused by a pin which he is grasping coming out of the pole, owing to its having been driven in place negligently by another lineman whose duty it was to drive it.

TORT, at common law, for personal injuries sustained by the plaintiff's testator, a lineman, in falling from a pole of the defendant while at work there in the defendant's employ. Writ dated May 31, 1898.

In the Superior Court *Sheldon, J.* ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*N. D. Pratt*, for the plaintiff.

*J. A. Lowell*, for the defendant.

MORTON, J. It was the duty of the defendant to exercise reasonable care and diligence in seeing that the structures and appliances which it provided were free from defects so that the plaintiff's testator and others in its employ being themselves in the exercise of due care could safely perform the work which they were employed to do. The defendant could not avoid liability for injuries caused by its negligence in this regard by delegating this duty to others or by imposing it within the sphere of their respective duties upon those in its employ unless the circumstances were such as to constitute an assumption of the risk or want of due care on the part of the person or persons so injured.

There was testimony tending to show that the fall of the

plaintiff's testator and the injuries which he sustained were caused by the pulling out of a pin which he had taken hold of in the course of his ascent, and which came out while he had hold of it with one hand, and was looking over the wires to see which one should be removed. There was also testimony tending to show that the hole into which the pin had been driven was bored so that it slanted downwards, instead of being on a level or slanting upwards, and that the pin was only driven in two and one half inches instead of four as there was testimony tending to show that it ought to have been. This testimony would have warranted a finding that there was a defect in the original construction for which the defendant was responsible, and that the injuries received by the plaintiff's testator were due to it.

It cannot be said as matter of law that the plaintiff's testator was not in the exercise of due care or that he assumed the risk. Those were both questions for the jury as the case was left by the evidence that was introduced. The testator was engaged in the performance of his duty, and it would have been for the jury to say whether under the circumstances he ought to have examined the pin and was negligent in not doing so or in trusting his weight to it without such examination. The linemen were required by the rules to test the poles and steps if they thought there was danger, and if they found any loose steps to pull them out and report to the foreman. There is nothing to show that this step was loose and it may be doubtful whether the rule that they should test the poles and steps if they thought there was danger added anything to what would be required in the exercise of due care. But, further, there is nothing to show that he thought that there was danger, and whether, in the exercise of reasonable care, he ought to have discovered the condition of the step or was negligent in trusting himself to it were, as already observed, questions for the jury. The fact that the linemen were required to drive the steps in after the poles had been set up and the holes bored would not relieve the defendant in the absence of proof that the plaintiff's testator himself drove in the step which came out and thereby contributed by his own negligence to the injuries which he received. In driving in the steps the linemen acted as agents for

the defendant and it would be liable for their negligence. It cannot be said that the chance of an accident like that which occurred under the circumstances under which this accident occurred was one of the risks of the business which the deceased assumed.

*Exceptions sustained ; case to stand for trial as agreed on the question of damages only.*

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ATTORNEY GENERAL vs. JOHN F. HUTCHINSON & others.

Middlesex. November 16, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Municipal Corporations. Elections.*

Under St. 1898, c. 548, §§ 835, 886, 861, a town, which has adopted the use of official ballots for the election of town officers, may, at a meeting held more than thirty days before the next annual meeting, vote to abandon the method of electing selectmen provided by § 835, theretofore adopted by the town, and return to its former method of electing annually three selectmen to serve for one year.

INFORMATION, in the nature of quo warranto, filed by the Attorney General on March 12, 1903, to determine by what authority the respondents Hutchinson, Taylor and Spaulding held the offices of selectmen of the town of Lexington, and praying for an order to set aside their election as such selectmen.

The case came on to be heard before *Morton, J.*, and was reported by him for determination by the full court upon the pleadings and the facts reported, such judgment or decree to be entered as the pleadings and the facts should require.

*H. Albers*, for the plaintiff.

*H. G. Allen*, for the defendants.

BRALEY, J. Prior to the enactment of St. 1878, c. 255, towns at their annual meeting elected a board of selectmen whose term of office was for the period of one year. By that act, any town which accepted its provisions might at any annual meeting choose them, so that the tenure of office of each member of the board would be for a term of three years. If for

any reason a town adopting this method desired to return to the old system, it might do so at any annual meeting. Pub. Sts. c. 27, §§ 64-69.

Subsequent legislation revising and codifying the laws relating to elections substantially re-enacted this provision. Sts. 1893, c. 417, § 267; 1898, c. 548, § 335, now R. L. c. 11, § 339.

When the town of Lexington at the meeting held in January, 1900, voted to exercise the choice given by these statutes of electing selectmen, and voted, "that at the annual meeting in March of the current year, the town shall elect one selectman for the term of one year; one for the term of two years, and one for the term of three years, and that at each annual meeting thereafter it shall elect one selectman for the term of three years," it legally decided to abandon the old system of tenure of such officers and adopted the new.

Between the time when towns were given this option within certain limits of regulating the term of office of selectmen, and the date of the vote making the change, the General Court had entered upon a course of legislation by which the method of preparing for and conducting state, city and town elections was radically changed. Sts. 1888, c. 436; 1889, c. 413; 1893, c. 417; 1898, c. 548; R. L. c. 11.

Ballots to be used in voting at state and city elections were to be printed and distributed at the public expense, and the nomination of candidates for office, the preparation, form and delivery of ballots, and the manner of voting, were worked out in great detail.

No provision, however, was made in the first two acts, which referred solely to state and city elections, for regulating the election of town officers, and the method of conducting such an election remained the same as before. The next year, the Legislature by a separate act extended these provisions to town elections; provided any town desired to accept the act, and make its choice manifest by adopting its provisions, otherwise the method was left unchanged. St. 1890, c. 386. By this statute a change was made in the manner of conducting the election of town officers, only in those towns which duly accepted it.

Under this act it follows that towns must be divided into two classes, those that accept, and, having accepted, must use the

ballot therein prescribed, and towns which did not accept, and remained under the original system.

The town of Lexington, by its vote at the town meeting held February 21, 1891, had accepted the provisions of St. 1890, c. 386, and thereby placed itself in the class of towns to prepare for and conduct the election of town officers in the manner therein provided. And when it voted to make the term of office of its selectmen three years, it exercised this privilege as a town which had used the official ballot in voting for such officers for nearly nine years.

By the act, after it was accepted, and the "system or manner of electing any town officers" had been determined, no return to the former system could be made, unless the meeting at which the change was decided upon was held at least thirty days before any annual town election at which town officers were to be elected, though in towns which still continued under the former system of voting this change as to their office could be made at the annual meeting at which they were to be elected. Sts. 1890, c. 386, § 2; 1898, c. 548, §§ 335, 336, 361.

If the various sections which embrace previous legislation in whole or in part, and which make up the codification of former acts in St. 1898, c. 548, are examined and compared, so far as they relate to the election of town officers, nothing appears that is so inconsistent or repugnant but that full effect can be given to each provision.

The intention of the Legislature is plain. It is important that the voters should know whether a candidate for the office of selectman is to be elected for one or three years, and in towns which use ballots prepared at the public expense, and where the election is conducted in the same manner as state and city elections, some time is necessary to prepare and distribute the ballots before the election takes place.

For this reason, a limit of thirty days before the next annual election was fixed as the time after which the length of the term of officers to be then elected could not be changed; but there is no such requirement in towns that do not use the official ballot.

The town meeting of January 28, 1901, was held more than thirty days before the next annual meeting, and when the town

voted under article two of the warrant, "that at the annual town meeting in March, 1901, the town shall elect one selectman for the term of one year, and in March, 1902, shall elect two selectmen for the term of one year, and in March, 1903, shall elect three selectmen for the term of one year, and thereafter shall annually elect three selectmen for the term of one year, in the manner in which the selectmen have been elected prior to the election of March 5, 1900," it had thereby legally voted to choose its board of selectmen so that the tenure of each member should be only for one year. And the three selectmen thereafter elected would each serve for that period.

At the annual meeting following this action by the town, the respondent, John F. Hutchinson, was elected accordingly a selectman for the term of one year. For reasons not necessary to be stated he afterwards resigned, and on May 20, 1901, at a meeting duly called to fill the vacancy, and under an article in the warrant, "to choose by ballot one selectman to fill a vacancy for the term ending March 1904," he was declared elected a selectman for the term ending March, 1904, and since that time has filled and now claims to hold the office.

The other respondents now in office were each chosen as selectmen for the term of three years.

By the vote of January 28, 1901, which remained unchanged, the town had decided thereafter to elect these officers for the term of one year, and it must be held that the several respondents have no title to the office. It follows that there must be judgment of ouster.

*So ordered.*

## COMMONWEALTH vs. JOHN A. SHEA.

Middlesex. November 18, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Intoxicating Liquors. Carrier.*

Under R. L. c. 100, § 50, an expressman who brings intoxicating liquors into a no license city or town, is liable to prosecution, if he transports the liquors to the place of actual delivery without first having entered in the book required by the statute the date of the reception of the liquors by him and a transcript of the marks required by § 49 of the same chapter.

COMPLAINT, received and sworn to on May 25, 1903, against an expressman under R. L. c. 100, § 50, for illegally transporting intoxicating liquors into the city of Everett, a no license city.

At the trial in the Superior Court before *Aiken, J.*, the case was presented upon an agreed statement of facts, by which it was agreed, that on May 23, 1903, the defendant was conducting a general express business between Boston and Everett; that on that day he had received as expressman forty packages containing intoxicating liquors to be delivered to various persons in Everett; that all of the packages had been tagged properly as required by the statute; that thirty-seven of the packages had been entered in a book kept by the defendant for that purpose in the form required by the statute; that three packages had not been entered in the book, through a mistake, as alleged by the defendant; that the several persons named on the packages had bought the liquors contained in those packages of various liquor dealers in Boston; that the defendant brought the liquors into Everett, a no license city, and a police officer of Everett looked at the various packages on the defendant's team, and at the defendant's book, and told the defendant that these three packages were not on the book and should be there; that the defendant said he knew they should be on the book and he thought they were there; that after this notice by the police officer, the defendant took from his team one of the three packages, addressed to P. McMahon, without having entered it in his book, and without taking his book with him, and was on the



sidewalk near the gate leading to McMahon's place when he was stopped by the police officer and arrested for violation of R. L. c. 100, § 50; and that none of the packages containing liquors which had not been entered upon his book had been delivered.

The defendant asked the court to rule, that on the agreed facts there had not been any violation of law, as the defendant had not made a delivery of liquors to any one whose name did not appear upon his book, that the defendant had the right at any time, up to the time of absolute delivery of the liquor to the person whose name was upon the tag attached to the parcel, to make an entry in his book in conformity with law and have the consignee or owner receipt for the parcel, and that the jury should return a verdict for the defendant.

The judge refused to make this ruling, and instructed the jury that upon the evidence set out in the agreed statement of facts they would be warranted in finding the defendant guilty. The jury returned a verdict of guilty; and the defendant alleged exceptions.

*H. D. Gove & J. M. Gove*, for the defendant.

*G. A. Sanderson*, District Attorney, for the Commonwealth.

**BARKER, J.** The question for decision is whether an expressman who has brought intoxicating liquors into a town or city which grants no licenses violates the provisions of R. L. c. 100, § 50, by carrying the liquors to the actual place of delivery without having first made any entry concerning them in the book which he is required by that section to keep.

The section is a continuation of the provisions of St. 1897, c. 271, § 2, which was an act to further regulate the transportation of such liquors into no license cities and towns. That statute was considered in the case of *Commonwealth v. Intoxicating Liquors*, 172 Mass. 311, where it is said that the act was "only one of the many statutes which indicate that the policy of the Commonwealth is to require that the traffic in liquors in this State shall be open, so that every step shall be exposed to the scrutiny of the authorities, and that the violation of the law may be the more easily detected." The book is to be at all times open to the inspection of the proper authorities. The expressman is not only to keep the book but is to "plainly

enter therein the date of the reception . . . of each vessel or package . . . received for transportation, and a correct transcript of the marks " as well as the date of delivery. Considering the purpose of the provision, to expose every step of the transaction to the scrutiny of the authorities, we are of opinion that it is a violation of the section for an expressman who brings liquors into such a city or town, to transport them therein to the place for actual delivery without first having entered in the book the date of the reception of the liquors by him and the marks showing the names and addresses both of the seller or consignor and of the purchaser or consignee.

*Exceptions overruled.*

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DANIEL CRONAN *vs.* CITY OF WOBURN.

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Middlesex. November 17, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKEE, & BRALEY, JJ.

*Practice, Civil, Amendment. Way, Defect in highway. Pleading, Civil.*

In an action against a city for personal injuries, in which the declaration did not allege formally a defect in a highway, it appeared, that a notice in writing, given to the defendant within the time required by the highway act, alleged in substance that the plaintiff was injured by reason of a defect in a highway of the defendant caused by negligence of the defendant and its employees in making an excavation at the corner of certain streets. The defendant was not misled by the notice, and the case was tried solely on the issue of such a defect. At the close of the evidence the plaintiff was given leave to amend his declaration before final judgment by alleging expressly a defect in the highway. The jury returned a verdict for the plaintiff, and thereafter the plaintiff was allowed to make this amendment before judgment. *Held*, that for the purposes of the trial the amendment might be treated as made before verdict when the motion to amend was allowed, and that if there had been a variance it was cured by the amendment.

In an action against a city for personal injuries, a declaration alleging in substance that the plaintiff fell into an excavation on the westerly side of the sidewalk at or near the corner of two streets named, which the defendant had carelessly left unlighted, unfenced and unguarded, with proper averments of injury and of notice to the defendant, sets forth a good cause of action against the defendant for a defect in the highway caused by its negligence, without an averment that it was the duty of the defendant to keep the street in repair, this being a statutory obligation of which the court takes judicial notice.

In an action against a city for personal injuries, a declaration, setting forth in sub-

stance a defect in a highway of the defendant, alleged that the plaintiff owing to the negligence of the defendant "or its employees" fell into an unlighted and unguarded excavation which "the defendant or its employees" had made at a certain point in the highway. *Held*, that if the phrase the "defendant or its employees" was ambiguous, as covering employees of a department for whose negligence the city would be liable at common law, such a defect in the declaration, if it existed, could be taken advantage of only by demurrer and not under an answer of general denial.

TORT for injuries received by the plaintiff on Main Street at the corner of Eaton Avenue in the city of Woburn. Writ dated October 30, 1901.

The declaration was as follows:

"And the plaintiff says on Tuesday, the 8th day of October, 1901, at or about 7.30 o'clock in the evening while in the exercise of due care, he attempted to cross Main Street, a public street in the city of Woburn, when owing to the neglect and carelessness of the city of Woburn, or its employees, he fell into an unlighted and unguarded excavation which the defendant or its employees had made on the southeast corner of said Main Street and Eaton Avenue, a public street, on the westerly side of the sidewalk on Main Street at or near the corner of said streets which the defendant had carelessly left unlighted, unfenced and unguarded; that the plaintiff knew nothing of said excavation, and while attempting to cross said street at said point, fell into said excavation and thereby received great and severe bodily and mental injuries, which said injuries are permanent:

"And he further says that on account of said fall, he has suffered great and severe pain and mental anguish, and has suffered great loss in not being able to attend to his customary work and has been put to great expense for necessary nurses, medical care and attendants and medicine.

"He further says that on the 26th day of October, he caused a written notice to be served upon John H. Finn, city clerk of the city of Woburn, stating the time, place and cause of said injuries, and that he should look to the city for compensation for the damages he had thereby sustained."

In the Superior Court the case was tried before *Bishop, J.*

In opening the case the plaintiff's counsel stated that the action was for a defect in the highway, and that the defect consisted in an excavation at the corner of Main Street and Eaton

Avenue in Woburn, which had been left insufficiently guarded and protected and into which the plaintiff fell, and described the excavation.

The defendant admitted that Main Street was a public highway in the city of Woburn.

The defendant admitted the service, but not the sufficiency, of the following notice: "Boston, Oct. 29, 1901. John H. Finn, City Clerk of the City of Woburn. Dear Sir:— I, Thomas Weston, for and in behalf of Daniel Cronan of Woburn, in the County of Middlesex and Commonwealth of Massachusetts, hereby give you notice that the said Daniel Cronan received serious injuries by reason of the neglect and carelessness of the city of Woburn and by certain persons to me unknown, employed by the city of Woburn who neglected to guard by fence, lights or otherwise, an excavation which the said city and its employees had made at the corner of Eaton Avenue and Main Street, in that part of Woburn known as Central Square. The said Daniel Cronan, on Tuesday, the 8th day of October, 1901, at or about half past seven in the evening while crossing Main Street, on account of the said neglect of the city of Woburn and its servants, fell into an unguarded excavation which was situated on the southeast corner of said Main Street and Eaton Avenue, on the westerly edge of the sidewalk on said Main Street at or near said corner; that by reason of said carelessness in leaving said excavation unfenced, unlighted and unguarded, said Daniel Cronan was greatly injured, and he hereby gives you notice that he will claim damages for the said injuries he has sustained. Yours truly, Thomas Weston, for and in behalf of Daniel Cronan."

At the close of the evidence, the judge, among other rulings, stated that if necessary the declaration could be amended at any time before final judgment to support the action for the cause for which it was intended to be brought.

The jury returned a verdict for the plaintiff in the sum of \$3,000. After verdict the plaintiff moved to amend his declaration by adding the following: "Second count. And the plaintiff says there is in the city of Woburn a public highway leading through said city known as Main Street, which said defendants are bound to keep in repair;

"That the same was negligently suffered by the defendants to be out of repair whereby the plaintiff travelling thereon and using due care was hurt and that due notice of the time, place and cause of injury was given."

The motion was allowed by the judge. The defendant alleged exceptions.

*F. P. Curran*, for the defendant.

*T. Weston*, for the plaintiff.

**BRALEY, J.** This was an action of tort for injuries received by reason of a defect in a public highway within the municipal limits of the city of Woburn, and which it was required to keep in suitable repair for the use of travellers. A verdict having been returned for the plaintiff, the case is here on exceptions by the defendant.

We treat all the exceptions not argued as waived; and it is now contended that the notice given, and the declaration itself, are not sufficient in law to sustain the verdict.

While the notice given to the defendant may be open to a refined criticism that in part it refers to the carelessness of certain persons employed by the city and who neglected to properly guard the excavation in the street into which the plaintiff fell as a possible separate ground of liability, yet, taken together, the fair construction is that the plaintiff was injured by reason of a defect in a way negligently caused by an excavation "which the said city and its employees had made at the corner of Eaton Avenue and Main Street, in that part of Woburn known as Central Square."

It is not suggested that the defendant was misled by the notice, as it was fully informed of the cause of action, and the case was tried solely upon the issue of such a defect, and submitted to the jury under appropriate instructions.

When this question was raised at the trial, at the close of all the evidence the plaintiff was given leave to amend his declaration at any time before final judgment, in order to support the action for the cause for which it was intended to be brought. And after verdict and before judgment, under the exception of the defendant an amendment was accordingly made and allowed.

The evidence shows that the cause of action relied on was the

defect in the way caused by the negligence of the defendant, and the defendant now makes no claim that the alleged defect in pleading was not cured by the amendment.

As there was no surprise at the trial, and the merits of the case were fully tried upon the understanding that the city was to be held liable only if the way proved to be defective by reason of its negligence, the allowance of the amendment, for the purposes of justice, may be treated in legal effect as if made before verdict and at the time when permission to amend was given.

If originally the exception, that there was a variance between the allegations and the evidence offered to sustain them, was well taken, it became worthless after the amendment was allowed. It no longer stated a legal defence, but raised only an academic question. R. L. c. 178, § 48. *Keller v. Webb*, 126 Mass. 393, 394. *Whitney v. Houghton*, 127 Mass. 527, 529. *Denham v. Bryant*, 139 Mass. 110, 112. *United States National Bank v. Venner*, 172 Mass. 449, 451. *King v. Howes*, 181 Mass. 445, 446.

But the original declaration set out a good cause of action against the defendant for a defect in the way caused by its negligence.

It was not necessary to aver that the city was obliged to keep the street in repair, as this is a statutory obligation of which the court is bound to take judicial notice. Pub. Sts. c. 52, §§ 1, 18. *Read v. Chelmsford*, 16 Pick. 128, 130.

If the phrase "the defendant or its employees" was deemed ambiguous as stating a possible alternative liability, such a defect is to be pointed out by demurrer. It is not legally available at a trial on the merits for the purpose of defence by a defendant whose answer is a general denial.

*Exceptions overruled.*

## COMMONWEALTH vs. JOHN CRONIN.

Essex. November 17, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Evidence, Private conversations between husband and wife.*

In a criminal case in which the defence is insanity, the wife of the defendant is prohibited by R. L. c. 175, § 20, cl. 1, from testifying to a private conversation in which the defendant told her that he would drown himself, although the statement thus excluded is relevant to show the defendant's state of mind.

INDICTMENT, found on May 12, 1902, for an assault with intent to murder.

At the trial in the Superior Court before *Harris, J.*, the defence relied upon was insanity caused by epilepsy. It appeared, that after committing the assault in question the defendant, being pursued by persons who had come up, ran to a pond and threw himself in, and was rescued from the pond in an unconscious condition. The defendant's wife testified to an illness of the defendant alleged to be epilepsy, and was allowed without objection to testify in regard to the condition of the defendant as manifested by his symptoms. The defendant then offered to show by his wife that immediately upon coming out of this attack the defendant declared that he would drown himself. The judge excluded this evidence solely upon the ground that it was a private conversation between husband and wife. The jury returned a verdict of guilty; and the defendant alleged exceptions.

*W. S. Knox & W. Coulson*, for the defendant.

*W. S. Peters*, District Attorney, for the Commonwealth.

BARKER, J. The defendant's statement that he would drown himself was made in private to his wife. It was relevant to his condition of mind, but was made incompetent and inadmissible as evidence in his favor by the prohibition of the statute, "Neither husband nor wife shall testify as to private conversations with each other." R. L. c. 175, § 20, cl. 1. *Fuller v. Fuller*, 177 Mass. 184, and cases cited. It did not come within the reason of the exception which allows abusive language

addressed by a husband in private to his wife to be given in evidence to show abusive treatment. See *French v. French*, 14 Gray, 186.

*Exceptions overruled.*

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UNITED SHOE MACHINERY COMPANY vs. J. SUMNER HOLT  
& another.

Suffolk. December 9, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Damages. Equity Jurisdiction. Equity Pleading and Practice. Conversion.*

On the issue of the market value of certain machines, where it appears that the only market for the machines in this Commonwealth is in selling them to jobbers for export, the measure of value is the market value here, and the value of the machines is not to be arrived at by deducting from their value in a foreign market an amount representing the expense and risk of sending them to that market.

A bill in equity was brought to obtain possession of certain machines. On an application for a temporary injunction, it was found as a fact that the machines had been shipped out of the Commonwealth, and the defendant was ordered to file an answer before the time for filing it under the rules of court. The case was sent to a master and proceeded to a hearing. In this court the defendant raised the point that on the facts there was no jurisdiction in equity. *Held*, that this point was not open to the defendant; that, by the order directing the answer to be filed before it was required by the rules, the court retained the suit for the assessment of damages, and that, by appearing before the master without objection to the jurisdiction, the defendant had waived this objection, even if it would have been good had it been made at the proper time.

Where a bailee of goods sells the property outright, without authority to do so, the bailment is ended, and the general owner has a right of immediate possession, on which he can maintain trover or equitable replevin.

A suit in equity to obtain possession of certain machines, after it was shown that the machines had been shipped out of the Commonwealth, was retained by the court for the assessment of damages, thus changing the suit from equitable replevin to a proceeding in the nature of trover. The lessee of the machines had sold them outright without authority, and both the lessee and the purchaser were made defendants. The defendant purchaser objected that the lessee was joined improperly as a defendant. *Held*, that, assuming that the same rule applied in equitable replevin as at law, by which only the person in wrongful possession of the chattels could be sued in replevin, yet the defendants would have been liable jointly in trover and were retained properly as defendants in the assessment of damages.

In a suit in equity it is too late, on the conclusion of the taking of evidence before a master, for a defendant to make objection to the joinder of another defendant as a party.



BILL IN EQUITY, filed December 6, and amended December 17, 1901, against J. Sumner Holt and Russell S. Holt, both of Boston, copartners doing business under the name of J. S. Holt and Company, and Myron L. Whitcomb and Howard L. Clark, both of Haverhill, copartners doing business under the name of J. H. Winchell and Company, to obtain possession of twenty-six lasting machines leased by the Boston Lasting Machine Company, whose rights had been acquired by the plaintiff, to J. H. Winchell and Company and sold by them to the defendant J. Sumner Holt, who, as alleged in the amendment to the bill, had sold the machines to persons unknown to the plaintiff and shipped them to places outside of this Commonwealth.

The proceedings in the case are stated in the opinion. Upon the presentation of the master's report and the exceptions thereto, the Superior Court made a final decree overruling a motion of the defendant J. Sumner Holt to recommit the master's report, and overruling the same defendant's exceptions to the report, also overruling the plaintiff's exceptions to the master's report, and ordering that the report be confirmed, declaring that the defendants J. Sumner Holt, Myron L. Whitcomb and Howard L. Clark were jointly and severally liable to the plaintiff in the sum of \$5,070, with interest from March 4, 1901, \$680.22, a total of \$5,750.22, and ordering that the plaintiff have execution for that sum and costs to be taxed by the clerk.

The plaintiff appealed from the decree, claiming a larger amount than that given by the decree. The defendant J. Sumner Holt also appealed from the decree.

*E. F. McClennen*, for the plaintiff.

*W. A. Buie*, (*J. E. Crowley* with him,) for the defendant J. Sumner Holt.

LORING, J. By the bill in this suit when it was filed, the plaintiff sought to obtain possession of twenty-six lasting machines which had been leased to J. H. Winchell and Company and sold outright by them to the defendant Holt for \$300. By what is entitled an "interlocutory decree" but which apparently was made on a motion for a temporary injunction, it was found that the machines had been shipped out of the Commonwealth, and the defendant was directed to file his answer before it was

due. This was in effect an order that the bill be retained for the assessment of damages, which was the only relief which could be given under those circumstances. The case was sent to a master by an order which is not included in the record.

From the master's report it appeared that the twenty-six machines in question were made by the Boston Lasting Machine Company and leased to J. H. Winchell and Company in 1891-1893. The lessor sold its interest in all Boston lasting machines to the plaintiff in October, 1900, and the sale to the defendant Holt was in March, 1901. It appeared that at some time between 1893 and 1901 the plaintiff had come into control of the Hand Method lasting machine, and that the plaintiff found it to be for its interest to sell the Hand Method machine in preference to the Boston machine. As showing that there was a market for the Boston machine in Boston after the plaintiff had taken up the Hand Method machine, evidence was admitted "that some manufacturers had refused to surrender their leased machines," and "there were also occasional orders for it from abroad." It was also found by the master that "These machines were sold by the Boston Lasting Co. and the complainant as its successor in Boston, in quantity for resale abroad, with the collateral agreement that they were to go out of the country, and that if any should afterwards be returned to the United States, the title to such machines so returned should revert in the Boston Lasting Machine Co., or in the complainant its successor." The master also found that "under the above conditions sales of the Boston lasting machines in quantity have been made within the last three years in Boston by the Boston Lasting Machine Co., or by the complainant as its successor, at two hundred and fifty dollars a machine, and that said machines were subsequently resold abroad for five hundred dollars each; and this I find as a fact. The purchasers of these machines in quantity to be sent abroad were corporations distinct from, but controlled by, the Boston Lasting Machine Co., or the complainant as its successor. The sales of the machines to such corporations were outright sales, and the jobbing corporation received the profit on a resale of the machine abroad for five hundred dollars," and that "Boston lasting machines to be used in the United States were not sold, but were leased, for the life of the

patents thereon, to boot and shoe manufacturers throughout the country by a written lease." Officers of the Boston Lasting Company and of the plaintiff company testified that "the fair market value of a Boston lasting machine was five hundred dollars, or from five hundred to one thousand dollars," and one of the partners of J. H. Winchell and Company testified "that the market value of the twenty-six machines was three hundred dollars"; but he also testified that "he had never known of the sale of a Boston lasting machine, and his only knowledge of the market value of shoe machinery was derived from his purchase of various kinds of shoe machinery for his own use at different times."

The master found "that in 1901 there was still some demand for the Boston lasting machine, principally from abroad, and that when one was sold it was still sold in the United States to go abroad, for two hundred and fifty dollars," reported all the facts bearing upon the market value of Boston lasting machines in March, 1901, and ruled "that the market value of a new Boston lasting machine in March, 1901, was the price at which it was sold in quantity in Boston to jobbers for resale abroad, to wit, two hundred and fifty dollars, and not the price for which it was sold by the jobbers abroad, to wit, five hundred dollars"; and "assuming this ruling to be correct," he found "that the market value of these twenty-six second-hand machines in March, 1901," was \$195 each.

1. The plaintiff has raised the question of the correctness of this ruling and finding by the third, fourth, fifth, seventh and eighth exceptions taken by him to the master's report. Where a defendant is liable for converting an article of personal property which has a market value in Massachusetts, the measure of damages is to be ascertained by its market value here, and not by the value which it may be found to have here by deducting from its market value in a foreign market a sum which would fairly represent the expense and risk of sending it to the foreign market. This was assumed to be the law in *Glaspy v. Cabot*, 135 Mass. 435. There may be cases in which the evidence warrants the ruling that the damages are to be measured by the market value in the domestic or in the foreign market. See *Coolidge v. Choate*, 11 Met. 79. This is not such a case. On

the facts found by the master the only market for these machines in Massachusetts was to jobbers for export. The defendant Holt sent the machines abroad and sold them there, that is to say, he did what a jobber for export would have done had he bought the machines. We are of opinion that the ruling was right.

2. By his eighteenth request for a ruling to be made by the master, the defendant undertook to object to the jurisdiction of the court by reason of the fact that on the facts existing or supposed by the plaintiff to exist when the bill was brought, there was no jurisdiction in equity, and for that reason the bill could not be retained for the assessment of damages. But, as we have already said, the fact that the machines had been shipped out of the Commonwealth was found as a fact in the "interlocutory decree" made December 9, 1901, directing the answer to be filed before it was due under the rules. After this the suit was retained for the assessment of damages. The defendants waived this objection (if the objection was a good one) by going to a hearing before a master on an answer in which this objection was not set up.

3. By his exception to the master's report in not giving the first, second, third, fourth, fifth and sixth rulings of law requested by him, the defendant has raised the objection that until the lease had been terminated by the plaintiffs, J. H. Winchell and Company had the right of possession and therefore that neither equitable replevin would lie, on which jurisdiction this bill as originally brought was founded, nor would an action of trover lie, for which in effect the bill was retained. Possession, or an immediate right to possession, is necessary to maintain equitable replevin as well as an action of trover or a writ of replevin, but where a bailee misuses the subject of the bailment, as he does in case of an absolute sale transferring the whole property, the bailment is ended and the general owner has an immediate right of possession on which he can maintain trover. The point is concluded by the decision in *Carter v. Kingman*, 103 Mass. 517, although not discussed in terms in the opinion. But it is a matter which is well settled. See Putnam, J., in *Ayer v. Bartlett*, 9 Pick. 156, 160; *Fenn v. Bittleston*, 7 Exch. 152; *Cooper v. Willomatt*, 1 C. B. 672; *Bryant v. War-*

dell, 2 Exch. 479; *Farrant v. Thompson*, 5 B. & Ald. 826; *Johnston v. Whittemore*, 27 Mich. 463; *Grant v. King*, 14 Vt. 367; *Sanborn v. Colman*, 6 N. H. 14. The reason why the action failed in *Newhall v. Kingsbury*, 131 Mass. 445, and in *Raymond Syndicate v. Guttentag*, 177 Mass. 562, was because, when the writ was taken out, nothing beyond an assignment of the bailee's interest, or what was tantamount to that, had taken place; and ordinarily a lessee or conditional vendee has a right to transfer his interest. See *Glaspy v. Cabot*, 135 Mass. 435, 440.

4. By an exception to the master's report for not giving the ninth ruling requested by him, the defendant Holt objects that he and J. H. Winchell and Company cannot be jointly held in this suit. It is true that in an action of replevin two persons cannot be made parties defendant merely because they are jointly liable in trover, *Richardson v. Reed*, 4 Gray, 441, and it may be assumed that the same rule applies in equitable replevin. But it appears that the defendants J. H. Winchell and Company were made parties defendant by an amendment to the bill, consented to by the defendant Holt after it had appeared of record, that the goods had been shipped out of the Commonwealth and the bill had been retained for the assessment of damages. In an action of trover the seller and the purchaser can be jointly held liable. *Smith v. Briggs*, 64 Wis. 497. *Grant v. King*, 14 Vt. 367. See *McAvoy v. Wright*, 137 Mass. 207, 210. It is not necessary to point out that on the conclusion of the taking of evidence before the master it is too late to take an objection of this kind.

5. We find no error of law in the finding of the master as to the damages due.

6. The other questions have not been argued. If under these circumstances the defendant could be treated as not waiving them by stating that he does not do so, it is enough to say that we see no error of law in them.

*Decree affirmed.*

ALBERT F. KING, JR., trustee, vs. MILAN C. CRAM  
& others.

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Essex. December 17, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Equity Pleading and Practice. Assignment. Bankruptcy. Insurance, Life.*

In a suit in equity coming to this court by report, where the evidence was not taken by a commissioner and is not reported in full, the conclusions of fact stated in the report must be taken to be true.

One who voluntarily assigns a policy of insurance on his own life cannot maintain a bill in equity for a cancellation of the assignment on the ground that the assignee has no insurable interest in his life.

A trustee in bankruptcy, under the bankruptcy act of 1898, has the same rights against the assignee of a policy of life insurance, taken out by the bankrupt and assigned by him in good faith before he was insolvent, that the bankrupt himself would have and no greater.

Under St. 1894, c. 522, § 73, (R. L. c. 118, § 73,) the beneficiary of a policy of life insurance issued before April 11, 1894, cannot sue on the policy in his own name, and a policy taken out by the assured before that date, if otherwise valid, is none the less so for want of an insurable interest on the part of the beneficiary.

In the absence of evidence of a gambling contract, it is not necessary to the validity of an assignment of a policy of life insurance that the assignee should have an insurable interest in the life of the assured.

BRALEY, J. This bill in equity was brought by the trustee in bankruptcy of the defendant Cram, who was adjudged a bankrupt on August 8, 1901, to have a policy of insurance on his life declared to be the property of the bankrupt's estate. The policy was issued by the State Mutual Life Assurance Company on August 16, 1888, and on the twenty-sixth day of October, 1888, it was transferred by him to his sister in law, Lizzie R. Perham, one of the defendants, by an assignment duly received, and recorded by the company. In the Superior Court the bill was taken for confessed against the State Mutual Life Assurance Company, joined as a party defendant; and after a decree had been entered dismissing the bill, the case was reported to this court on findings of fact and rulings of law made at the trial.

For the purposes of our decision, as the evidence was not taken by a commissioner, and is not fully reported, the conclusions drawn therefrom, and the facts set out in the report, must

be taken to be true. *Wentworth v. Woods Machine Co.* 163 Mass. 28.

It is found, and stated, that when the assignment was made by the bankrupt he was not insolvent, and there was no intention on his part to hinder, delay or defraud his creditors, and the transaction could not be treated as colorable, but was intended to pass his title in the policy to the assignee. Under this finding of fact, there was no conveyance of property in fraud of his creditors, whether the assignment of the policy be considered as founded on a sufficient consideration, or treated as purely voluntary on his part, and a gift by him to his sister in law.

It does not appear that the assured when he assigned the policy was under the disability of infancy, or of unsound mind, or executed and delivered the instrument under the influence of fraud or coercion practised on him by the defendant Perham. And on the facts reported, he could not successfully maintain a bill in equity, to have his free and voluntary act declared to be of no legal effect, and for a cancellation of the assignment. *Fairbanks v. Snow*, 145 Mass. 153, 154. *Adams v. Collier*, 122 U. S. 382, 390.

The trustee stands in no better position than the bankrupt and assignor. Whatever rights, if any, the latter had which would enable him to avoid the transfer, are now possessed by the plaintiff, but he is not clothed with any further or larger powers to set it aside. Bankruptcy act of 1898, § 70 a (5), *e. Pratt v. Wheeler*, 6 Gray, 520. *Holmes v. Winchester*, 133 Mass. 140, 142. *Sibley v. Quinsigamond National Bank*, 133 Mass. 515. *Munroe v. Dewey*, 176 Mass. 184. *Emery v. Boston Terminal Co.* 178 Mass. 172, 184. *Warren v. Moody*, 122 U. S. 132. *Adams v. Collier*, *ubi supra*.

If, however, it be assumed that it is open to the trustee to contend, that no title to any property of the bankrupt passed by the assignment, because the person to whom it was made did not have at the time an insurable interest in the life insured, and the assignment therefore is void as a matter of public policy, and will not be enforced by the courts, he does not state a case that entitles him to equitable relief.

Whatever the negotiations may have been between Milan C. Cram and the defendant company concerning the terms of the

policy, and who should be made the beneficiary, or the form of the application made by him, the policy that was issued constituted the contract of insurance, and was made payable at maturity "to the person whose life is hereby insured, or his assigns," and in case of his death "to his executors, administrators or assigns," and not to Lizzie R. Perham as he had requested. See *O'Brien v. Continental Casualty Co.* 184 Mass. 584.

But if the assignment be treated as a means of transferring the policy to her, and so carried out his primary intention, she is not placed in a worse legal position than if she had been named originally as the person to whom the amount of the policy was to be paid. The contract of insurance was obtained and made by him; the life insured was his life. Independently of the source from which the money was derived, whether a loan by her, or she advanced it, in expectation of receiving at some time the value of the policy, or coming in part from his own funds, the premiums in each instance were paid by him to the company, and by reason of his membership-as a policy holder he was entitled to vote in the management of its corporate affairs. This policy was issued in 1888, and by St. 1894, c. 522, § 78, now R. L. c. 118, § 78, any suit for the recovery of the amount of the policy, at the period of maturity, must have been brought in his name, or in the case of his death, in the name of his executor or administrator. *Wright v. Vermont Ins. Co.* 164 Mass. 302.

He had an insurable interest in his own life, and this was enough to support the policy, and prevent it from being considered a mere wagering contract, in which he had no interest whatever in the amount to be paid under it, but only in the life insured, and where the beneficiary becomes a mere gambler, whose object is purely speculative, depending on the death of the insured, rather than on a continuance of his life.

A contract in this form is not on its face a mere gaming risk, and hence is not void as against public policy. *Forbes v. American Ins. Co.* 15 Gray, 249, 255. *Campbell v. New England Ins. Co.* 98 Mass. 381. This would be enough to dispose of the plaintiff's contention, but he cannot prevail for another reason.

At the date of the assignment, as between the company and the bankrupt, the original policy had not been surrendered, and was still in force as a valid existing contract.



The assignee was a sister of his wife, a member of his household, and his house was her home; apparently, he was owing her quite a sum of money for services, and it can fairly be inferred, not only from motives of affection for her sister, and for him, but from those of pecuniary advantage and gain, she would desire the continuance of his life in preference to his death. Under these conditions, the assignment appears to have been taken by her in good faith, and not for the purpose of gambling on the hazard of the duration of a life, in which her brother in law after the assignment, had no monetary, but only a vital interest. There were no limitations in the policy preventing him from a free disposition of all his title to and benefits under the contract, and he might sell it, or he could dispose of it by gift to a relative by marriage.

In either case, in the absence of evidence to show, that notwithstanding its form, it was intended as a gaming transaction, the purchaser, or the donee, takes a good title, free from any immoral taint; and it would not be necessary in order to sustain it, that they should have an insurable interest in the life of the assignor and donor. *Mutual Ins. Co. v. Allen*, 138 Mass. 24, 31, 32. *Shea v. Massachusetts Benefit Assoc.* 160 Mass. 289, 291. *Fairchild v. Northeastern Ins. Co.* 51 Vt. 625. *Connecticut Ins. Co. v. Schaefer*, 94 U. S. 457, 463.

The findings and rulings made at the trial, that the transaction between the parties was not fraudulent, as against the creditors of the bankrupt, and that the assignee acquired a good title under the assignment of the policy which could not be avoided by the plaintiff, were right.

*Decree affirmed.*

*M. A. Pingree & J. J. Ryan*, for the plaintiff.

*J. H. Pearl & O. J. Carlton*, for the defendant Lizzie R. Perham.

## MARY E. BUTRICK &amp; others, petitioners.

Essex. December 18, 1903. — February 25, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Partition. Disseisin. Evidence.* Of ancient deeds, Extrinsic affecting writings.  
*Deed, Registration, What included by. Practice, Civil, Auditor's report. Judgment.*

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Under Pub. Sts. c. 178, §§ 14, 15, (R. L. c. 184, §§ 8, 9,) the persons interested in the land of which partition is sought, who have a right to appear in the proceedings, include persons who had been in possession of portions of the land for nearly twenty years when the petition was brought and have been in such possession more than twenty years at the time of the trial and have erected buildings and made other valuable improvements on the land.

The bringing of a writ of entry against the occupant of land, before the expiration of the twenty years of his possession by reason of which the occupant claims title by disseisin, does not interrupt his possession, where the action has not been prosecuted to judgment and it appears that the tenant ultimately must prevail.

Where it is shown that a deed, dated in 1776, was found in the possession of an heir of one of the grantees, and various records of the Probate Court tend to show that the possession and claim of title of the parties to the deed was for a long time in conformity with it, the deed may be admitted in evidence without formal proof of its execution.

Whether the provisions of Pub. Sts. c. 120, §§ 7, 8, 18, (R. L. c. 127, §§ 10, 11, 18,) as to the manner of proving and certifying for record an unacknowledged deed after the death of the grantor, apply to a deed executed in 1776 and recorded in 1896, *quære*.

An unrecorded deed is competent evidence to show that the premises thereby conveyed were not included in certain later deeds executed by some of the heirs of the grantor by which they released and transferred all right and interest which they had in any estate real and personal of their ancestor, the grantor of the unrecorded deed.

An auditor, who was not directed to report the evidence taken before him, concluded his report as follows: "The testimony is in four volumes marked . . . All said exhibits and testimony are hereby referred to for full particulars as to all matters therein contained and shown." *Held*, that the reference in the sentence last quoted did not make the evidence a part of the auditor's report.

A judgment, in reference to collateral rights of the parties not necessarily included in the action, is conclusive only as to matters which were put in issue and adjudicated.

In proceedings upon a petition for partition, where there were a number of petitioners and a number of respondents, it appeared, that all the petitioners but one had brought a writ of entry against one of the respondents. *Held*, that the petitioner who was not a party to the writ of entry could not avail himself of a judgment upon it, but that the judgment was conclusive between all the other petitioners and that respondent who was the tenant in the real action.

KNOWLTON, C. J. This is a petition, filed October 12, 1893, under Pub. Sts. c. 178, for partition of two parcels of land in Haverhill, between the Merrimac River and Washington and River Streets. They are parts of a larger lot which formerly belonged to Jacob Ayer of Haverhill, who died intestate in 1790. The petitioners contend that the premises belonged to Jacob Ayer at the time of his death, and were conveyed afterwards by his heirs to one Nathan Ayer, and that they are some of the heirs at law of Nathan. This is their only claim of title. None of the petitioners nor any of their ancestors, so far as appears, was ever in possession of any part of the property. Until within the last thirty years the land has been used as a fishing place, extending for a considerable distance along the shore of the river.

The respondents appeared under the Pub. Sts. c. 178, § 14, (R. L. c. 184, § 8,) as persons interested in different portions of the premises described in the petition, and severally averred that they were in possession of the portions described in their several answers and were the sole owners thereof in fee simple, and denied that the petitioners, or any of them, were seised of the premises or of any part thereof, or entitled to possession, or to maintain their petition. To each of the answers a replication was filed by the petitioners under the Pub. Sts. c. 178, § 15, (R. L. c. 184, § 9,) averring that the respondent has no estate or interest in the premises, and praying judgment if he shall be admitted to object. The case was referred to an auditor who filed an elaborate report, and it was then heard before a judge of the Superior Court without a jury. It was found by the auditor that the lands are now nearly all occupied with buildings, and that they had been in the possession of the several respondents and those under whom they claim, for nearly twenty years before the bringing of this petition, and more than twenty years before the trial, subject to a question as to the effect of a writ of entry now pending, brought December 24, 1889, by all but one of the petitioners against one of the respondents, to recover one of the parcels.\* In addition to their

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\* There was a previous writ of entry between the same parties for the possession of another lot, brought in November, 1884, in which in December, 1891, the demandants obtained judgment. The earlier writ of entry was before this court at different stages as reported in 141 Mass. 93 and 155 Mass. 461.

claim of a title by adverse possession the respondents set up a deed made by the guardian of Jacob Ayer, dated December 25, 1776, whereby he conveyed the premises under authority of the court to John Mulliken, Nathaniel Marsh and Bailey Bartlett, all of Haverhill. Jacob Ayer was then insane, and afterwards remained so as long as he lived. This deed was introduced, not as showing title in the respondents, but to show that Jacob Ayer did not own the property at the time of his death, and that therefore the petitioners acquired no title under the deed from his heirs to their ancestor, Nathan Ayer. The auditor and the judge found in accordance with the contention of the respondents in this particular.

At the trial, after the evidence had all been heard, the petitioners, under their replications, asked the judge to rule that the respondents have no interest in the premises within the meaning of the Pub. Sts. c. 178, §§ 14, 15, (R. L. c. 184, §§ 8, 9,) and that they are not entitled to object to the partition. This request raises the first question for our consideration.

1. The interest of the respondents, as disclosed by the evidence, was that of persons in possession who had erected buildings and made other valuable improvements, and who had been in possession nearly twenty years when the petition was brought, and more than twenty years at the time of the trial. The auditor's report indicates that each of the later occupants held the property "under a title which he believed to be good," and that he therefore comes within the Pub. Sts. c. 178, § 81 (R. L. c. 184, § 19).

The purpose of § 15 seems to be to relieve petitioners from the necessity of a trial upon objections made by persons not named in the petition as respondents, if it appears that they have no estate or interest in the lands. For that purpose there may be a preliminary hearing to determine whether the person appearing has an interest. If the whole case is heard and the evidence concluded upon all questions affecting the rights of the petitioners and the respondents, the reasons for this provision are no longer applicable. Whether one holding a mere possessory title of recent origin should be deemed to have an interest under this section, is a question not free from difficulty, and which it is not necessary in this case to decide. As was said by

Chief Justice Shaw in *Marshall v. Crehore*, 18 Met. 462, 467, a petition for partition is made by our statutes "to a much greater extent than formerly, an adversary proceeding, to try and decide controverted questions of title." The case of *Cook v. Allen*, 2 Mass. 462, which was decided under St. 1783, c. 41, and St. 1786, c. 58, holds that one claiming a title by disseisin is a proper party to such a proceeding. See also *Munroe v. Luke*, 19 Pick. 39. There are peculiar reasons why one who has made improvements, holding under a title which he believes to be good, ought not to be refused an opportunity to be heard. Under § 31, above referred to, he is not only entitled to receive compensation for his improvements, but he is liable for the petitioner's share of the rents and profits, and these are to be ascertained in the suit. The proceedings in the present case would make this section applicable if the petitioners' evidence entitled them to a decree for partition.

The case of *Tilton v. Palmer*, 31 Maine, 486, relied on by the petitioners as tending to show that the respondents ought not to be heard, is an adjudication in a different form of proceeding. It is under a statute which makes a different kind of provision as to compensation for improvements and liability for rents and profits, and it is materially modified by the later cases of *Saco Water Power Co. v. Goldthwaite*, 35 Maine, 456, *Brackett v. Persons Unknown*, 53 Maine, 238, and *Richardson v. Watts*, 94 Maine, 476.

The general rule is that a person having title by disseisin cannot be disturbed in his possession except by one who shows a better title. In a case like the present, when upon a full trial of the case it appears that the petitioners have no title, nor any right to possession, it would be a gross injustice to give them a decree for partition, and compel the respondents to have the value of their improvements estimated, and to pay the petitioners their share of the rents and profits. Even under the decisions in Maine relied on by the petitioners, it is plain that all of the respondents but one are entitled to be heard, and to rely upon the petitioners' want of title as a defence, for it is held in those cases that if the possession is continued more than twenty years before the trial, it ripens into a perfect title, even though the petition was brought before the expiration of the

twenty years. This doctrine is plainly applicable to all the respondents but one. As to that one, it is said that the bringing of a writ of entry before the expiration of the twenty years interrupts his possession and defeats his title. This would be true if the writ had been prosecuted to a judgment in favor of the demandants. But when it appears, as it does upon the proof in this case, that the suit cannot be maintained, and that the tenant must ultimately prevail, no such effect can be given to the bringing of a writ of entry. We are of opinion that there was no error in the refusal of this ruling.

2. The deed from the guardian of Jacob Ayer to John Mulliken and others was a very ancient deed, and it was found in the possession of an heir of one of the grantees. Moreover, the various records from the Probate Court tend to show that the possession and claim of title of the parties to it was for a long time in conformity with it. Under such circumstances an ancient deed may be admitted in evidence without formal proof of its execution. *Phillips v. Watuppa Reservoir Co.* 184 Mass. 404, and cases there cited. *Stockbridge v. West Stockbridge*, 14 Mass. 257. *Green v. Chelsea*, 24 Pick. 71.

In the year 1896 this deed was proved before the Probate Court in accordance with the Pub. Sts. c. 120, §§ 7, 8, 13, and was recorded in the registry of deeds. Whether this mode of proof as a preliminary to registration was applicable to a deed executed in 1776, it is unnecessary to decide, as the original was rightly admitted in evidence.

3. It is contended that the instrument was not competent because an unrecorded deed passes no title except as against the grantor and his heirs and devisees and persons having actual notice of it. Pub. Sts. c. 120, § 4. (R. L. c. 127, § 4.) But this deed was not admitted as a deed which should be effectual to deprive a grantee of land actually conveyed to him under a later deed. It was admitted as a material fact bearing upon the construction of the language of description in the deeds to Nathan Ayer under which the petitioners claim. These later deeds did not purport to convey any particular land in Massachusetts. They are merely releases and transfers of the interest of the grantors, if they then had any, in the estate of Jacob Ayer, real and personal. The language of description is, "all

the right we have in any estate real or personal belonging to the estate of Jacob Ayer late of Haverhill aforesaid deceased." These deeds were made in 1810 and 1811, and were not recorded until 1884 and 1889. Under a deed containing such a description, with no designation either general or special of any property, the grantee takes nothing unless it is shown that there is property to which the language applies. The prior deed to Muliken and others shows that the language of these later deeds does not include the lands in question. *Adams v. Cuddy*, 13 Pick. 460. *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159. *Woodward v. Sartwell*, 129 Mass. 210. *Fitzgerald v. Libby*, 142 Mass. 235. *Dow v. Whitney*, 147 Mass. 1. The doctrine as stated in *Adams v. Cuddy*, *ubi supra*, has been explained and limited in some of the later cases above cited, but its application to cases like the present has not been questioned. These deeds were made by some of Jacob Ayer's heirs more than twenty years after his decease. In terms they referred to the estate of a deceased person, and they implied a possibility that the several grantors had some interest in his estate, and they conveyed these interests, if there were any. We think it plain that the property referred to was only that which would pass to his heirs or distributees upon the settlement of his estate, and not that which he had conveyed away, even if the deed of conveyance had not been recorded.

4. The judge rightly refused to consider the evidence heard before the auditor which was returned with his report. The auditor was not directed to report the evidence and it was not his duty to report it. For special reasons, as to present a question of law, it is often the duty of an auditor to report certain evidence; but in a case like the present, it would be an impropriety to make all the evidence a part of the report. After referring to exhibits and plans enumerated in a list, the auditor's report concludes as follows: "The testimony is in four volumes marked H. W. (B) (C) (D) & (E) January 9, 1900. All said exhibits and testimony are hereby referred to for full particulars as to all matters therein contained and shown." It is said that the hearing before the auditor was very long. It is not to be presumed that he made four volumes of testimony a part of his report to be read at the trial without a clear statement to that

effect. The reference to it in the last sentence does not purport to make it a part of the report. We do not understand the reason for the reference. Very likely it was for the satisfaction of the parties, and for the auditor's justification if questions should ever arise as to the correctness of his conclusions. The evidence was not a part of the report.

The findings of the auditor and the facts stated in his report well warranted a finding by the judge that the deed from the guardian to Mulliken and others included all the land described in the petition.

5. The judgment in the first writ of entry does not establish the title of the petitioners to any other land than that described in the writ. As between the parties to it, the judgment is conclusive as to the land demanded in the writ, not only in reference to the matters actually put in issue, but as to all that might have been put in issue. But in reference to collateral rights not included in the action, it is conclusive only as to matters which were in issue and adjudicated. *Foye v. Patch*, 132 Mass. 105. *Watts v. Watts*, 160 Mass. 464. The title to other lands was not in issue, and could not be included in the judgment. At the trial of the present case no evidence was introduced beyond the record in the real action to show what matters were actually put in issue. In the absence of such evidence it cannot be held that any matters affecting this case were collaterally determined.

The petitioners' exceptions must, therefore, be overruled.

The respondent Tilton excepted to the ruling of the court that the judgment in the first real action was binding upon him in this proceeding, and that the petitioners "are entitled to partition in the lot called City Landing No. Fourteen solely on account of the judgment in said real action."

The only ground on which this ruling can be attacked is that one of the petitioners was not a party to that judgment. The doctrine of estoppel by a former judgment rests upon the mutuality of the relation of the parties to it; but it has often been held that the lack of absolute identity of the parties in the former suit and in the later one does not necessarily deprive the judgment of its conclusiveness between those who were parties to it. *Green v. Bogue*, 158 U. S. 478, 503. *Thompson v.*



*Roberts*, 24 How. 283, 241. *Lawrence v. Hunt*, 10 Wend. 80. *Davenport v. Barnett*, 51 Ind. 329. *Marshall v. Pinkham*, 73 Wis. 401.

In the present case the petitioner, Lucy C. Kimball, was not a party to the former judgment, but the other petitioners and the respondent Tilton were the opposing parties. The other petitioners ought not to be precluded from relying upon it because the petitioner Kimball is joined with them in this suit; on the other hand, the petitioner Kimball cannot avail herself of it, for her rights were not involved in the former trial, and neither she nor Tilton could be bound as to her rights. The judge ought to have ruled that the judgment was conclusive against the respondent Tilton in favor of the other petitioners, but that it was not competent in favor of the petitioner Kimball. *Dyett v. Hyman*, 129 N. Y. 351, 358. *Whitcomb v. Hardy*, 68 Minn. 265. The finding was, therefore, erroneous so far as it pertains to the share of the petitioner Kimball, but was correct in other particulars. For this reason there must be a new trial as to this lot, unless the petitioner Kimball elects to become nonsuit, in which case the entry may be

*Exceptions overruled.*

*H. N. Merrill & B. B. Jones*, for the petitioners.

*H. P. Moulton, R. D. Trask & J. H. Pearl*, for the respondents.

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HAMILTON MANUFACTURING COMPANY *vs.* CITY OF LOWELL.  
APPLETON COMPANY *vs.* SAME.

Middlesex. January 12, 1904. — February 25, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Tax. Corporation.*

Under Pub. Sta. c. 11, § 53, (R. L. c. 12, §§ 58, 59,) the machinery of a manufacturing corporation is to be taxed as personal property, and must be valued separately from the land and buildings of the corporation. If the land and buildings are overvalued, the corporation is entitled to an abatement, whether the land, buildings and machinery taken together are overvalued or not.

A manufacturing corporation maintaining a wall of one of its mill buildings on land within the location of a railroad company outside the limits of the route of the railroad, by permission of the railroad company and of the owner of the fee of the land, is not taxable for the land so used by it.

TWO PETITIONS to the Superior Court, filed September 27, 1900, and amended March 4, 1903, under St. 1890, c. 127, (R. L. c. 12, §§ 78-81,) appealing from decisions of the assessors for the city of Lowell refusing to abate certain taxes imposed upon the respective petitioners in the year 1899.

In the Superior Court the cases were heard together by *Mason, C. J.*, without a jury. At the close of the hearing the respondent requested the judge to rule:

"2. The petitioners, not having introduced or offered any evidence of the value of the machinery, have not shown that the mill yards, including buildings and machinery therein, were overvalued, and said petitioners have not shown that they are aggrieved by the assessors' valuation in such mill yard.

"3. The land, buildings and machinery in the mill yards are all parts of one parcel, and unless such parcel taken as a whole has been overvalued by the assessors the petitioners are not entitled to an abatement, even though the land or buildings, or both, were overvalued.

"4. On all the evidence, the land included within the alleged railroad location is taxable to the Hamilton Manufacturing Company."

The judge refused to make any of these rulings.

Upon the matter referred to in the request last above quoted, numbered 4, there was a statement of agreed facts, by which it appeared, that there was included in the assessment of the mill yard of the Hamilton Manufacturing Company about thirteen thousand square feet of land, the fee of which was in the Proprietors of the Locks and Canals, and which was within the location filed by the Boston and Lowell Railroad Company for the portion of its road which was used only to carry goods and merchandise to and from the mills of the Hamilton Manufacturing Company; that on a portion of this land the last named company maintained a wall which furnished a partial support for one of its mill buildings which extended on an arch over a part of the location and track of the railroad company; that

the use of this land by the manufacturing company, under certain indentures, was authorized by the railroad company, and was assented to by the Proprietors of the Locks and Canals so long as the railroad company retained its location there.\* It was contended by the respondent, that this land within the railroad location properly could be assessed to the Hamilton Manufacturing Company as in its possession within the meaning of Pub. Sts. c. 11, § 13, (R. L. c. 12, § 15.) The judge ruled that upon the agreed facts the Hamilton Manufacturing Company was not taxable for the land within the railroad location.

The judge found that, on the first petition, the tax of the Hamilton Manufacturing Company should be abated in the sum of \$5,293.80, and that, on the second petition, the tax of the Appleton Company should be abated in the sum of \$960.49. The respondent alleged exceptions in both cases.

*W. A. Hogan*, for the respondent.

*F. E. Dunbar*, for the petitioners.

KNOWLTON, C. J. These are petitions to the Superior Court in the nature of appeals from decisions of the assessors denying to each of the petitioners an abatement of its taxes upon real estate. The petitioners are manufacturing corporations; and the respondent contended as to each petitioner that its land, buildings and machinery in the mill yard, were all parts of one parcel, con-

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\* By indenture of June 29, 1888, the railroad company authorized the Hamilton Manufacturing Company "to maintain and keep the walls and buildings and arch already existing over a portion of said strip and over the track of said Lowell railroad thereon as the same are now built and constructed, and further authorize and empower the said manufacturing company to extend walls and buildings of substantially the same construction with an arch not less than eighteen (18) feet in height above said railroad tracks over the remainder of said strip, . . . so long only as the same shall be used by said manufacturing company, its successors or assigns, for purposes substantially similar to those for which the said manufacturing company now uses them."

The Proprietors of the Locks and Canals in an indenture of August 31, 1888, assented to the above named indenture of June 29, 1888, subject to the proviso that nothing therein "shall give or convey unto or vest in said Hamilton Manufacturing Company any estate, easement or right in said strip of land for or during any other or longer time or term than the term for which said land was leased to said railroad corporation in or by the lease of said proprietors above-named" [a lease to the railroad company dated July 14, 1848].

stituting a single unit for taxation, and that the petitioner is not entitled to an abatement unless the parcel taken as a whole was overvalued, even though there was an overvaluation of the land, or buildings, or both.

Under our statutes and decisions, real estate and personal estate are two distinct classes of property for the purpose of taxation. *Preston v. Boston*, 12 Pick. 7. *Howe v. Boston*, 7 Cush. 273. *Lowell v. County Commissioners*, 8 Allen, 546. Taxes upon real estate are a lien upon the property, and may be collected by a sale of it, while taxes upon personal property cannot be collected in this way. This in itself is a sufficient reason for assessing them separately. Different parcels of real estate belonging to the same owner cannot properly be assessed together upon a single valuation. *Hayden v. Foster*, 13 Pick. 492. *Jennings v. Collins*, 99 Mass. 29.

Land and the buildings upon it are ordinarily parts of the same real estate, and they cannot be separated for the purpose of collecting taxes. Although for statistical purposes they are at first valued separately, their aggregate worth, limited by their value in use together, constitutes the valuation of the entire real estate for the purpose of taxation. But this principle does not apply to machinery in a mill used with land and buildings for manufacturing purposes. The requirement of the Pub. Sts. c. 11, § 53, (R. L. c. 12, §§ 58, 59,) that machinery shall be valued separately, is partly for statistical purposes, and partly because it has to some extent a local character which well may make it a subject of local taxation. Its worth is deducted from the whole value of the corporate property in determining the value of the franchise. See R. L. c. 14, §§ 37, 42. Such machinery is not taxed as real estate, but as personal property. The land and the buildings and the water power are real estate, and are taxed accordingly.

Except for the purpose of enforcing a lien in the collection of the tax on real estate, it is ordinarily of no practical consequence to any one, in drawing a line between machinery which is personal property and fixtures in a building which are real estate as between grantor and grantee, whether the division is made precisely as the law makes it in connection with conveyances of such property. It is often a matter of great difficulty to deter-

mine as between mortgagor and mortgagee, or grantor and grantee, whether certain kinds of machinery do or do not pass as a part of the real estate. In all doubtful cases it is better that the rule as to taxation should be such as to give a lien for the collection of the tax only when the tax is upon that which is plainly real estate. Perhaps for this reason the statute authorizes taxation of machinery as personal property in terms broad enough to include that which otherwise properly might be taxed as a part of the building. But all that is taxed as machinery and not as a part of the building is taxed as personal property. It is not a part of the same unit of taxation as the land and the buildings.

The fact that, when the land, buildings and machinery are of more value if kept together and used for mill purposes than if separated, each of them should be valued for taxation at its worth as used in connection with the others, (see *Troy Cotton & Woolen Manufactory v. Fall River*, 167 Mass. 517,) does not affect the principle. In proceedings for an abatement, the machinery is to be treated as belonging to a separate class, and if the land or the building is overvalued an abatement may be ordered, whether the machinery is rightly valued or not.

The judge rightly ruled that, upon the agreed facts, the Hamilton Manufacturing Company is not taxable for the land within the railroad location. The right of the petitioner is a mere easement in the land, terminable on the happening of a contingency. The fee is in the Proprietors of the Locks and Canals, and the title of the railroad company under its location, inasmuch as the land is outside of its road five rods in width, is not exempt from taxation under the statute. R. L. c. 111, § 96. It is unnecessary further to consider the effect of the indentures, or to determine anything more than the questions raised by the exceptions.

*Exceptions overruled.*

## ESTHER H. HAWKS vs. ALICE H. DAVIS.

Essex. January 13, 1904. — February 25, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Tax, Sale.*

Under St. 1888, c. 390, § 57, (R. L. c. 13, § 58,) an assignee of a mortgage, under an assignment made before a tax sale and unrecorded at the time of the sale, upon recording his assignment, becomes the mortgagee of record entitled to redeem.

Under St. 1888, c. 390, § 57, (R. L. c. 13, § 58,) which gives a mortgagee of record the right to redeem from a tax sale within two years after he has actual notice of the sale, it is a question of fact for the jury whether a person, who acted as the mortgagee's agent in holding the notes and mortgage for the purpose of collecting interest, had authority to receive such a notice so that actual notice to him would be actual notice to the mortgagee.

A notice from the purchaser of land at a tax sale to the mortgagee of record, stating that the giver of the notice has purchased the property from the city, is not a good notice of the tax sale under St. 1888, c. 390, § 57, (R. L. c. 13, § 58,) if it does not state or suggest that the property has been sold for taxes.

Whether the expiration of two years, after an actual notice of a tax sale given by the purchaser to the mortgagee of record, would prevent the assignee under an unrecorded assignment of the mortgage, who had not received notice of the sale, from acquiring a right to redeem from the sale by recording the assignment, *quære*.

One redeeming land from a tax sale under R. L. c. 13, § 58, who pays interest at the rate of ten per cent on the amount of the original tax and on all intervening taxes paid by the holder of the tax title, is not required also to pay such interest on the three dollars allowed for the examination of the title and on the cost of a deed of release and the cost of recording the tax deed and other necessary intervening charges.

WRIT OF ENTRY, dated December 7, 1900, for a lot of land and the buildings thereon on East Highland Street, formerly known as Rockland Street, in Lynn.

At the trial in the Superior Court before *Wait*, J., it appeared, that the title of the demandant depended on her right to redeem from a tax sale under which the tenant claimed as stated in the opinion. The purchaser at the tax sale, through whom the tenant claimed, was one Stephen P. Weld. The notice given by Weld to Neal referred to in the opinion was as follows: "Mr. Edward C. Neal, No. 1022 Washington St., Lynn, Mass. Dear Sir: I hold by deed from the City of Lynn the property No. 16 Highland Avenue, Lynn, on which you hold a mortgage. Have

you any interest in the property now? Please let me know at once. Yours truly, S. P. Weld, Per B."

The jury returned a verdict for the demandant; and, at the request of the tenant, the judge reported the case for determination by this court.

*J. Bennett & G. M. Stearns*, for the tenant, submitted a brief.

*R. D. Weston-Smith*, (*E. N. Chase* with him,) for the demandant.

KNOWLTON, C. J. This is a real action in which the demandant shows a good title as mortgagee, with an entry to foreclose which perfects her rights as against the mortgagor and all persons claiming under the mortgagor. The tenant shows a good title acquired under a sale for taxes assessed to the mortgagor after this mortgage was made, which title, unless redeemed, takes precedence of the title of the mortgagee. The demandant undertook to redeem from this tax sale, and the principal question is whether her attempt at redemption was effectual. This question may be divided into two parts: first, had she then a right to redeem; secondly, was her payment sufficient in amount?

The taxes on account of which the sale was made were assessed to the mortgagor for the year 1891; all other taxes, since as well as before that date, have been paid by the mortgagor. The mortgage was made in 1887 and was assigned by the original mortgagee to the demandant in May, 1888. This assignment was not recorded until July 12, 1899.

Under the St. 1888, c. 890, § 57, (R. L. c. 18, § 58,) a mortgagee of record has a right to redeem from a tax sale at any time within two years after he has actual notice of the sale. The demandant, after having recorded her mortgage, made a payment to the treasurer of the city of Lynn on April 28, 1900, for the purpose of redeeming the premises.

An assignee of a mortgage is a mortgagee of record within the meaning of this section. *Faxon v. Wallace*, 98 Mass. 44. An assignee of a mortgage whose assignment was made previously, but was unrecorded at the time of a tax sale, becomes the mortgagee of record entitled to redeem under this section, upon subsequently recording the assignment. *Hawes v. Howland*, 186 Mass. 267. The demandant was, therefore, entitled to redeem at the time of making this payment, if it was made within two

years after she had actual notice of the sale. The question as to the time of her receiving notice was submitted to the jury under proper instructions.

It was contended that actual knowledge of the sale a long time previously by one Breed, who acted as the demandant's agent in holding the notes and mortgage for the purpose of collecting interest thereon, was notice to the demandant. But the judge rightly left to the jury the question whether Breed's agency was broad enough to include receiving such a notice for her, or whether it was more limited.

The judge rightly ruled that the writing sent by the purchaser at the tax sale to Neal, the original mortgagee who was then the mortgagee of record, was not a good notice of the tax sale. It contained no statement or suggestion that the property had been sold for taxes. *Keith v. Wheeler*, 159 Mass. 161. It therefore is unnecessary to consider whether the demandant would have lost her rights by the expiration of two years after the giving of actual notice to the person who was then the mortgagee of record, while she was holding an unrecorded assignment of the mortgage.

The only remaining question is whether the amount paid by the demandant to the city treasurer for redemption was sufficient. It is conceded that it was, unless she was required by law to pay interest at ten per cent, not only on the original sum and intervening taxes paid by the holder of the tax title, but also on the cost of recording the tax deed and the three dollars for the examination of title and deed of conveyance or release, and other necessary intervening charges. We think the section already cited makes it plain that interest is not to be paid on these latter sums expended incidentally.

The instructions as to the right of the demandant to rents and profits were in accordance with the statutes. Pub. Sts. c. 173, §§ 12, 15. R. L. c. 179, §§ 12, 15.

There was no error in the instructions given or in the refusal to give the instructions requested.

*Judgment on the verdict.*



## SAMUEL H. HUDSON vs. WILLIAM H. BAKER.

Suffolk. January 13, 1904. — February 25, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Evidence, Admissions. Joint Tortfeasors. Equity Jurisdiction. Receiver.*

One who gives a receipt in writing for money is not estopped to deny that he received the amount named, but, if he does not contradict the terms of the receipt by competent evidence, he will be held to account for the money.

In an action by the receiver of the property of a fraternal beneficiary corporation for money alleged to have been received by the defendant as treasurer of the corporation and not accounted for by him, it became material to determine whether certain checks drawn by the secretary of the corporation to the order of the defendant should be charged to the defendant in addition to the amounts appearing in the receipts signed by the defendant. The counsel for the plaintiff admitted that the defendant was not liable for a part of the amount covered by the checks, on the express ground that the defendant could not be charged twice for the same debt. An auditor found that the amount of the checks was received by the defendant in addition to the amount shown by the receipts. *Held*, that in view of this finding, the plaintiff's claim was not diminished by the admission of his counsel.

In an action by the receiver of the property of a fraternal beneficiary corporation for money alleged to have been received by the defendant as treasurer of the corporation and not accounted for by him, it appeared, that the secretary of the corporation held the receipt of the defendant for a certain sum of money with which the defendant had charged himself by mistake, as this money had not been paid by the secretary to the defendant although it was the defendant's duty to have collected it from him. It further appeared that the money in question had been paid by the secretary to the plaintiff as part of a suspense fund representing money of the corporation wrongfully appropriated by the secretary, and that under the by-laws of the corporation the secretary was primarily liable to account for the money in question, but that the plaintiff had received it with the understanding that if the defendant was liable for this sum the secretary should not be made to pay it. *Held*, that the fact that the secretary also was liable for the money did not relieve the defendant from his liability in this action at law, it having been the defendant's duty to collect and account for the money. *Semble*, however, that the plaintiff as receiver holding this money as an officer of the court, the defendant might file a petition in the suit in equity in which the receiver was appointed, for an adjustment of the equities of the parties as to this portion of the fund.

CONTRACT by the receiver of the property of the Northern Mutual Relief Association, a fraternal beneficiary corporation, for money alleged to have been received by the defendant as treasurer of that corporation and not to have been accounted for. Writ dated October 2, 1901.

In the Superior Court the case came on to be heard before *Harris, J.* upon a report made by him as auditor before he was appointed a justice of that court. Both as auditor and as judge he found for the plaintiff in the sum of \$2,710.74, and ruled that the sum of \$900 mentioned in the opinion should be charged to the defendant. The judge reported the case for determination by this court upon the points of law stated in the opinion.

*E. Lowe*, for the defendant.

*G. W. Anderson*, for the plaintiff.

**BRALEY, J.** In the usual course of business, the secretary of the association, which was a fraternal assessment insurance company, received from time to time all money due from "subordinate associations," and from assessments levied upon "members at large." It then became his duty to make payments to the treasurer at the end of each week of the sums thus received. Whenever these payments were made, the treasurer gave him a receipt for the amount paid, and in stating the account the defendant has been charged with the face value of the several vouchers, but he contended as a matter of fact that a less amount in some instances had been paid to him than was shown by the entries on his books of receipts and expenditures.

The auditor however ruled, and it was affirmed by the court, that the defendant was bound by the receipts given, and must be charged with the amounts shown by them.

Nothing is stated by way of explanation showing why this ruling was made, and its application to the evidence before him, but the ruling alone is given.

If the defendant took the position that his books of account, wherein he debited himself with the payments received from the secretary, were to be taken as conclusive evidence in his favor, the ruling was right. By signing and delivering the receipts he acknowledged what they recited, and having signed them, in the absence of fraud or mistake, he was bound to this extent by his voluntary act, and the entries made by him must be treated as declarations in his favor, and can stand no better as evidence than declarations ordinarily made by a party in his own behalf.

But if it was intended to hold that the receipts were equivalent to an estoppel, and it was not open to the defendant to show

by way of explanation that he had not received the various sums stated, it was wrong. For it is familiar law that a receipt is always open to explanation or contradiction by oral testimony. *Stackpole v. Arnold*, 11 Mass. 27, 32.

With more or less of doubt we are of opinion, taking the entire report as a guide, that the ruling must have been limited to the first ground, and did not preclude the defendant from explaining or contradicting the receipts, and it must have been so understood by the parties.

The next ruling reported relates to the effect of certain admissions made by counsel for the plaintiff at the trial.

It became important to determine whether certain checks drawn by the secretary to the order of the defendant, and amounting to \$2,014.86, should be charged to him in addition to the amounts appearing in the receipts.

When this question was raised, counsel for the plaintiff admitted, that only the sum of \$808.62 should be added, as the difference of \$1,206.24 between the two was covered by the receipts, and the defendant claims, that this admission was binding on the auditor, and it was error on his part to subsequently state the account, charging the defendant in addition with the face value of all of the checks.

It should be observed, in reply to the position taken by him, that in the plaintiff's motion to recommit, which was granted, he asks among other requests that the auditor may specifically find and report "whether or not said sum is not accounted for in the debits upon the defendant's book prior to the first day of December, 1900."

In his report the auditor finds "the defendant is to account for all funds of the association with which he charges himself, or which he is proved to have received, whether he has charged himself with them or not", and reports, that the amount of the checks was received in addition to the other sums stated.

The admission was made on the express ground, that the defendant should not be charged twice for the same debt, and it must have been so understood at the time by him, but under the subsequent finding in the supplemental report that this has not been done, the objection ceases to have any force or effect.

During the trial it appeared that the secretary held the re-

ceipt of the treasurer for \$900, with which the latter had charged himself through a mistake of fact in supposing that the money had been actually paid to him.

By an arrangement between them this amount was included, as the defendant claimed, in a suspense fund, made up of money paid to the plaintiff by the secretary, and which represented property of the association wrongfully appropriated by him, and it may be inferred, though not fully stated in the report, that it was understood, if the defendant was held liable for this sum, the secretary should not be called upon to make reimbursement.

But the defendant asks to be credited with this portion of the fund.

While it is clear under the by-laws of the association that the secretary is primarily responsible, the defendant is held liable also to account for it, under a finding made by the auditor, and which is supported by the evidence before him, that after the secretary had made known to the treasurer the amount of collections on hand, it became his duty to pay them to the defendant, who became bound under the duties of his office to receive and account for them; and if he allowed the secretary to retain any portion of the money, without giving him a sufficient warrant, and while so retained it was misappropriated, the defendant would nevertheless be liable, and the misconduct of the secretary would not constitute a defence.

As between the parties, the plaintiff has the right to pursue them both to the extent of obtaining judgment against each, but he can have but one satisfaction of his debt, and the ruling, that the defendant could not avail himself of this defence, was made rightly, for a court of common law could not compel the plaintiff to apply money conditionally received from one joint debtor, but not actually appropriated, in favor of the other, who was equally liable for the debt. *Vanuxem v. Burr*, 151 Mass. 386, 389. *Burnham v. Windram*, 164 Mass. 313.

The fund, however, is held by the receiver as an officer of the court which appointed him and is in its possession and control, and justice requires, that in some form of procedure the equities arising from the situation of the parties interested should be adjusted.

It will be open to the defendant, if it becomes necessary, to

bring the matter to the attention of the court, by a petition in the suit in equity in which the receiver was appointed.

*Judgment affirmed.*

185 126  
187 24  
f187 70

LOUIS DELOBY vs. WARREN K. BLODGETT & another,  
trustees.

185 126  
188 302  
188 441

Suffolk. January 18, 1904. — February 25, 1904.

185 126  
189 290  
189 291  
185 126  
190 193

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Master and Servant. Negligence, Employer's liability.*

An expert workman in the employ of a machinery company, furnished by that company to the proprietors of a power plant to make repairs on their machinery under the direction and control of their superintendent, is while engaged in this work the servant of the proprietors and the fellow servant of an engineer in their employ, and cannot recover from the proprietors for personal injuries caused by the negligence of the engineer.

In an action against the proprietor of a power plant by a servant in his employ, for personal injuries alleged to have been caused by the negligence of the defendant in employing an unfit and incompetent engineer, it is no evidence of the defendant's negligence that the engineer had been known to drink intoxicating liquor, if there is no evidence that he ever was intoxicated and no evidence that the defendant knew that he drank intoxicating liquor to excess or otherwise.

TORT, by a millwright and carpenter in the employ of the American Tool and Machinery Company, for personal injuries alleged to have been caused by the negligence of the engineer of the proprietors of a power plant, maintained at 256 and 258 on Purchase Street in Boston, where the plaintiff at the time of his injuries was engaged in examining, adjusting and repairing certain machinery of the defendants, also alleging negligence of the defendants in employing a careless, incompetent and intemperate person as engineer. Writ dated June 15, 1900.

At the trial in the Superior Court *Bond, J.* ruled that upon all the evidence the plaintiff could not recover, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

*W. A. Buie & W. J. Miller*, for the plaintiff.

*E. P. Carver, (F. H. Smith, Jr. with him,)* for the defendants.

KNOWLTON, C. J. The plaintiff, while repairing machinery in the defendants' shop, was injured through the negligence of

one Whippen, the defendants' engineer, in starting the machinery. The plaintiff rests his claim for damages on two propositions: first, that he was not a servant of the defendants, and therefore that Whippen was not his fellow servant; and secondly, that if Whippen was his fellow servant, the defendants were negligent in employing him because he was an unfit person to be intrusted with the management of an engine.

The plaintiff's relations to the defendants appear from his testimony as follows: He said he was a millwright and carpenter in the general employment of the American Tool and Machine Company as a jobber; that jobbers were sent to do any kind of work, and were supposed to go wherever they were sent, and work until the work was done; that he and another man were directed by telephone to go to the defendants' place; that he had been there two or three times before; "that what he was sent to do first was to tighten up a pulley"; that afterwards, while he was in the engine room washing his hands, the defendants' superintendent Alden came down and said to him, "Hurry upstairs, there is something wrong with the belt"; that he went upstairs with the superintendent, and started to work and adjusted the tightener; that when he got through that, the superintendent said to him, "Come over and see if the wire is leading in the centre of the sheave"; that when he first came upstairs it was at the request of Alden, the superintendent; that when he went up to go to work on the tightener, Alden went with him; that after he got through with the tightener he asked Alden if there was anything else to do, and that Alden called his attention to the rope that ran over the sheave. The plaintiff's undisputed evidence shows that he was an expert workman, lent to the defendants by his general employer to make repairs upon their machinery. It appears that the American Tool and Machinery Company were accustomed to render bills to the defendants for labor and materials furnished, the labor being charged and paid for at a price per hour.

The law in regard to persons working in this way has often been considered by this court. In *Hasty v. Sears*, 157 Mass. 123, Mr. Justice Barker quoted as a true statement of the principle, this language from *Cockburn, C. J. in Rourke v. White Moss Colliery Co.* 2 C. P. D. 205, 209: "But when one person lends

his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." In *Coughlan v. Cambridge*, 166 Mass. 268, 277, Mr. Justice Morton says, "The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired." In *Ward v. New England Fibre Co.* 154 Mass. 419, it was held that on the question whether work was done by the general master of the servant under a contract which gave him the right to control the business as it was going on, and to complete it without any right of interference or control by the person for whom it was being done, the fact that the payment was to be made at the usual prices for labor and materials, instead of by giving a round sum, was not conclusive. The mode of payment in such a case is usually very significant; but it is possible for a proprietor to contract for the performance of certain work on his property in a way which will give the contractor a legal right to furnish the whole work, and to direct all details, without interference by the proprietor, and to receive at the end a price to be determined by the current rates for labor and materials. In such a case, if the proprietor should prevent the performance of the contract by the contractor, he would be liable in damages; and so long as the work was going on, the workmen would be servants of the contractor, under his direction and control. This fact was also referred to in *Morgan v. Smith*, 159 Mass. 570; but in each of the cases the true principle was recognized, as stated by Mr. Justice Lathrop in the latter case, as follows: "There is no doubt that the general servant of one person may become the servant of another by submitting himself to the control and direction of the other. In such a case the servant becomes the fellow servant of the servants of the person under whose control he comes; and neither his general master nor his special master is liable if he is injured by the negligence of one of the other servants." It makes no difference whether the proprietor to whom a servant is lent actually exercises his right of control and direction as to the details of the work, or simply sets the servant to do what is necessary, trusting to his expert skill

for the result. This was decided in *Linnehan v. Rollins*, 137 Mass. 123. As was said in *Samuelian v. American Tool & Machine Co.* 168 Mass. 12, "The fact that they relied largely upon his skill and experience did not affect their absolute right to control him in everything he did upon their machinery."

The question in every case is whether the proprietor for whom the work is being done has given up his proprietorship of the particular business to an independent contractor, and has thus divested himself of the right of control, so that he has no longer a legal right to terminate the work or direct it. If he has done nothing to limit his rights in regard to the business which is being done for his benefit, but retains his proprietorship of it, each man who works in it is legally subject to his control while so engaged, and, in reference to the rights of third persons who are affected by the work, is his servant.

The rule applied when one furnishes for hire or lends to another a team of horses with a driver is simply an application of this principle. The circumstances are often such, that while the driver is the servant of the person to whom the team is furnished in reference to the question what he shall do or where he shall go, there is an implication that, as to the particulars of the management of the horses, he is the servant of his general employer, in whose interest and as whose representative he will manage and direct, within reasonable limits, such matters as pertain to the health and safety of the horses and the safety of the vehicle. In these particulars, for the preservation of his property, it will be presumed that the owner of the team retains in his driver a right of control. This is the ground of the decisions in *Huff v. Ford*, 126 Mass. 24. *Reagan v. Casey*, 160 Mass. 374, and *Driscoll v. Towle*, 181 Mass. 416. In the present case the plaintiff's testimony shows that he was not only legally subject to the direction and control of the defendants, but that the control was exercised by the defendants' superintendent by a series of directions. The plaintiff was a servant of the defendants, and a fellow servant of Whippen, the engineer.

There was no evidence that the defendants were negligent in employing an unfit or incompetent servant. There was testimony from two witnesses that at some times Whippen had been known to drink intoxicating liquor, but there was no evidence



that he was ever intoxicated, or that the defendants had knowledge that he drank intoxicating liquor, much less that he drank to excess. The testimony of other witnesses indicated that he was not in the habit of drinking liquor. The jury would not have been warranted in finding the defendants negligent in employing him.

*Exceptions overruled.*

185	130
f185	212
185	130
188	370
185	130
191	493
185	130
192	162
185	130
193	452
193	544
f194	367

### CHARLES BJORNQUIST vs. BOSTON AND ALBANY RAILROAD COMPANY.

Suffolk. January 20, 1904. — February 25, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Negligence, Liability to trespasser. Railroad.*

In an action against a railroad company by a boy about eight and a quarter years old, when injured, for injuries caused by jumping off a car of the defendant when ordered to do so by a person described as a brakeman, it appeared, that the plaintiff and another boy three years older were stealing a ride for amusement, and that the plaintiff was lying on his stomach on the edge of one of three oil tank platform cars, which were in a freight yard, moving very slowly without an engine, when the defendant's servant in charge of the cars, walking toward the plaintiff but not being near him, said "Get off there or I will break your neck", and the plaintiff thereupon put his foot in a step fastened to the car and was going to jump, when he slipped and fell under the wheels, receiving the injuries. *Held*, that there was no evidence to go to the jury of such a wilful and wanton disregard of human life and personal safety on the part of the defendant's servant as would make the defendant liable to the plaintiff, who was a trespasser, and that a verdict for the plaintiff was not justified.

TORT, by a boy eight years three and one half months old, when injured, for injuries from jumping off a freight car when ordered to do so by a servant of the defendant. Writ dated January 22, 1900.

In the Superior Court the case was tried before *Harris, J.* The judge refused to order a verdict for the defendant, and submitted the case to the jury, framing also four questions, which, with the answers given by the jury, were as follows:

"1. Was the plaintiff, at the time the brakeman spoke to and moved towards him, in a position of safety?" "He was."

"2. Was the car, at the time that the brakeman spoke to the

plaintiff, moving at such a rate of speed as to make it dangerous for the plaintiff to get off?" "It was moving at a dangerous rate of speed for the plaintiff."

"3. Did the plaintiff use due care in attempting to get off the car in obedience to the command of the brakeman?" "He did use all the care he was capable of at the time."

"4. Did the plaintiff attempt to leave the car because of fear of injury from the brakeman, or because he knew he was a trespasser and wanted to escape the consequences of his own act of trespass?" "He left on account of fear of injury from the brakeman."

The jury returned a verdict for the plaintiff in the sum of \$21,000; and the defendant alleged exceptions.

*S. Hoar*, (*G. P. Furber* with him,) for the defendant.

*S. A. Fuller*, (*W. E. Bowden* with him,) for the plaintiff.

KNOWLTON, C. J. The defendant was moving two or three oil tank cars on a short side track used for loading and unloading freight, close by its freight yard in Cambridge. The switching engine was behind the cars without being coupled to them, and the cars were pushed or "kicked" a short distance on the tracks, and left to stop from their own inertia. These were platform cars, constructed with a large tank extending longitudinally between points about two feet from the ends of the car, and with stakes set at intervals along the sides of the car at the edge of the floor, with an iron rod passing through the top of the stakes, leaving room to pass between the tank and the rod on each side. The plaintiff, a boy of ordinary intelligence, about eight and a quarter years of age at the time of the accident, was a trespasser on the forward one of these cars, lying on his stomach with his feet and legs hanging over the side of the car. At that point there was an iron step on the side of the car, and he had climbed up, taking hold of the stake, and was riding as the car was pushed by the engine. The floor of the car was about as high from the ground as his shoulders when he was standing, or as he testified, about as high as the crutch which he used at the time of the trial. One Perry, a companion, three years older than he, had got up on the opposite side of the car with his feet on the step, which was an iron strap or loop attached underneath to the side of the car, and was riding,

holding on to the upright stake which was near the end of the car. One of the defendant's servants, who is described as a brakeman, had uncoupled the engine from the car next it, and was riding on the car, when he saw one or both of these boys near the forward end of the forward car, and called out in a loud tone, "Get off there or I will break your neck." The boys immediately started to jump off, and the plaintiff fell so that his feet came upon the track and he was seriously injured. His language in testifying was, "When I was going to jump I slipped. . . . There was a step right there; I put my foot in that and I was going to jump and I slipped and went under the wheels."

The defendant's servant was acting in the management of the cars just before the accident, and it does not appear that any other person was employed at that time in the control of them. On this evidence the jury might well find that it was within the scope of his employment to try to keep trespassers away from them. To the plaintiff as a trespasser the defendant owed no duty, except to refrain from wilfully or wantonly and recklessly exposing him to danger. This is the uniformly recognized rule in regard to the management of a proprietor's business and the performance of his ordinary duties. A question may be raised whether the rule is the same if the proprietor does anything which is directed to the trespasser and is intended to affect immediately his conduct or condition. We are of opinion that in ordinary cases this makes no difference, if the action is in the exercise of the legal rights of the proprietor, and in other respects is in the proper performance of his duties. When this action takes the form of the intentional use of force upon the person of a trespasser, the force must be limited to that which is reasonable under the circumstances, in the exercise of his legal rights. Any excess may be punished as an assault and battery. This is because force upon the person of another is ordinarily harmful and injurious. One who uses it must guard his conduct so as not to go beyond his legal rights. So, if an action is brought for reckless and wanton negligence in dealing with a trespasser, and if the conduct relied on is the intentional use of force upon the person in an attempt to exercise one's legal rights, it may well be that because of the

injurious nature of the agency employed, wantonness and recklessness would ordinarily be inferred from any excess of intentional force beyond that which was reasonably necessary. But this principle is not applicable to a use of language which is intended to have no further effect than to influence the voluntary action of another. In the latter case the question is not whether the use of the language is entirely reasonable and proper, but whether it is so unreasonable or improper in reference to its probable effect upon the safety of the person to whom it is addressed, as to indicate a wanton and reckless disregard of probable dangerous consequences.

In the present case all that the brakeman did which is relied on as reckless and wanton negligence, was to call out as above stated, and to walk forward in an ordinary way. According to the testimony of two of the plaintiff's witnesses, he was not on the car on which the plaintiff was, but on the one behind it. According to the testimony of the plaintiff he was at the rear end of the car on which the plaintiff was, and from there was walking forward.

If we assume that he was in charge of the cars, it was his duty to do all that he reasonably could to keep trespassers away from them. It was his duty, not only in reference to the interests of his employer, but in reference to the interests of the trespassers themselves. The dangers to trespassers about moving cars, especially in freight yards, are great and constant. The persons with whom the employee has to deal, whether vagrants trying to steal rides upon freight trains or boys seeking amusement upon moving cars in freight yards, are almost always of a bold and lawless kind. Sober reasoning, friendly advice and gentle admonition, after the intruders have accomplished their purpose, would in most cases be entirely ineffectual to prevent or diminish trespassing by such persons. From the necessity of the case, appeal must be made in some form and to some degree to fear as a motive to induce obedience to proper rules. It is necessary and proper, in a reasonable way, to interfere with the enjoyment of boys taking rides in such places, rather than to permit them to complete their rides pleasantly.

The evidence is that the plaintiff lived only three hundred or four hundred yards from the place of the accident, and that

between his home and the railroad were open fields where the boys were accustomed to play ball and other games. He testified that just before the accident he was returning from fishing, and had stopped with two other boys to play tag on the platform of one of the buildings of the oil works at which cars were unloaded, and that as he saw the two tank cars and the engine he called to Perry, his companion, "Come on, let's take a ride," and that they then ran and got upon the car furthest from the engine. It is hardly to be supposed that boys living so near and accustomed to play close by moving cars, were ignorant of orders of their parents or others which forbade them to get upon the freight cars which were being switched back and forth in or near the yard. It is reasonable to infer that in dealing with such boys, quite as much for their own safety as for the interests of the railroad company, some show of severity would be needed on the part of the defendant's employees. These conditions are important in considering the conduct of the defendant's servant.

He gave a single command, accompanied with a threat, which no intelligent boy would interpret literally, but which implied a severe reproof, and a possibility of punishment if disobedience was repeated and persisted in. Except the use of this expression, which apparently was instantaneous and perhaps almost involuntary, there was nothing said or done by him to which exception could be taken. Is this evidence of a wanton and reckless disregard for the personal safety of the boys?

The conduct which creates a liability to a trespasser in cases of this kind has been referred to in the books in a variety of ways. Sometimes it has been called gross negligence and sometimes wilful negligence. Plainly it is something more than is necessary to constitute the gross negligence referred to in our statutes and in decisions of this court. The term "wilful negligence" is not a strictly accurate description of the wrong. But wanton and reckless negligence in this class of cases includes something more than ordinary inadvertence. In its essence it is like a wilful, intentional wrong. It is illustrated by an act which otherwise might be unobjectionable, but which is liable or likely to do great harm, and which is done in a wanton and reckless disregard of the probable injurious consequences. This is a wrong of a much more heinous character than common

inadvertence. See *Aiken v. Holyoke Street Railway*, 184 Mass. 269, and cases there cited.

In the present case there is no evidence to show when the brakeman first saw either of the boys, or whether he had seen more than one of them before he spoke. His language seems to refer to but one person. It is at least as probable that he was speaking to the larger boy, Perry, who was standing on the step on the right hand side of the car, as to the plaintiff. Perry's position was far more prominent than that of the plaintiff who was lying on the floor of the car. The fact that the brakeman subsequently walked forward on the side where the plaintiff was, is not significant, for upon all the testimony there was then nothing threatening in his attitude or manner. When he spoke the cars must have been going very slowly, for the testimony of both of the boys is that they started to jump off as soon as he spoke, and the cars moved only about fifty feet after the plaintiff fell. There was no evidence that the brakes were set at any time. Moreover, Perry testified that when he jumped off he passed around in front of the car and went away. If the cars, stopping of their own inertia, moved only fifty feet after the accident, they had then come almost to a state of rest.

The question relates to the state of mind of the brakeman, which can be inferred only from the circumstances. If his language was addressed to the plaintiff, was there, from his point of view, such a probability that he would jump off before the car stopped, as to involve any danger of falling? If the plaintiff should start to jump off before the car stopped, was there such a probability that he would get under the wheels as to indicate wantonness and recklessness on the part of the brakeman? There was a stake and a strap or loop step attached to the side of the car just where the plaintiff was; besides, the side of the car projected out beyond the track, and if the plaintiff fell perpendicularly he would not be likely to fall upon the track. The brakeman had no reason to think that a boy riding upon a car in that way would fail to use such care as he was capable of in getting off, whether he started before the car stopped or afterwards. The undisputed evidence shows that the plaintiff was not acting involuntarily, but was trying to jump from the step when his foot slipped.

The right of a brakeman upon a train to perform his prescribed duties, even though performance involves something of peril to a trespasser, is stated in *Leonard v. Boston & Albany Railroad*, 170 Mass. 318. In *Planz v. Boston & Albany Railroad*, 157 Mass. 377, where the trespasser was injured in jumping from a moving freight train at the command of a brakeman, it was held that there could be no recovery. *Mugford v. Boston & Maine Railroad*, 173 Mass. 10, is very similar to the present case, and it was held that there was no evidence of negligence on the part of the defendant's servant. In that case the plaintiff was a boy a little older than the present plaintiff, but the cars seem to have been running considerably faster than these. See also *Bolin v. Chicago, St. Paul, Minneapolis & Omaha Railway*, 108 Wis. 333. In view of the duties which the defendant's servant had to perform, and the circumstances attending the accident, we discover no evidence that when he gave his command there was such an apparent probability that it would cause serious injury to the plaintiff as to indicate a wanton and reckless disregard for harmful consequences.

If he had owed the plaintiff a duty to make provision for his safety, or to refrain from action which might in any degree expose him to danger, the case would be very different. If the question were whether he exercised such care for the plaintiff's safety as would be deemed reasonable for one charged with a positive duty to look out for him and protect him, it might well be submitted to the jury. If the brakeman's command was given to the plaintiff, as distinguished from the larger boy in a different situation, it might well be found that he did not exercise a high degree of care for the plaintiff's safety. But such an omission falls short of recklessness which is equivalent to a wilful wrong for which he would have been subject to criminal punishment if the accident had caused the plaintiff's death.

The burden of proof was upon the plaintiff to show this grave misconduct of the defendant's servant. While we feel that the case is not free from difficulty, we are of opinion that there was no evidence which tends to show that he was guilty of a wanton and reckless disregard for human life and personal safety.

*Exceptions sustained.*

## WILLIAM W. HUNT vs. JOHN C. HOLSTON.

Franklin. September 15, 1903. — February 26, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, &amp; LORING, JJ.

*Tax, Arrest for non-payment. Words, "Causing to be given."*

A person arrested for non-payment of taxes has a right to require that the provisions of the statute shall have been followed strictly.

Under St. 1889, c. 334, §§ 1, 4, requiring that before a person could be arrested for non-payment of a tax a demand should be made upon him "by causing to be given", or sent postpaid through the mail, as provided by the act, a notice of the tax to the person assessed, the words "causing to be given" refer to a notice delivered to the taxpayer in person, and are not complied with by an actual notice received by mail but not addressed as required by the act in case of a notice by mail. Otherwise under the present statutes. R. L. c. 18, §§ 1, 3.

MORTON, J. This is an action for assault and false imprisonment growing out of the arrest of the plaintiff for the non-payment of his taxes by the defendant as tax collector of the town of Wendell. The question is whether the notice sent to the plaintiff constituted a proper demand. The judge ruled that it did not and the defendant excepted. There was a verdict for the plaintiff. The defendant filed exceptions and also a motion to set aside the verdict and for a new trial which was allowed on the ground that the ruling in regard to the notice was erroneous. Thereupon the judge reported the case to this court. If the ruling was right and the setting aside of the verdict was wrong judgment is to be entered on the verdict, if the ruling was wrong and the setting aside of the verdict was right, then judgment is to be entered for the defendant.

The plaintiff was an inhabitant of the town of Wendell on May 1, 1897, and was duly assessed for a poll tax and a tax on real and personal estate. On September 5 of the same year he moved to Baldwinsville in the town of Templeton in Worcester County, leaving his taxes unpaid. On March 28, 1898, the defendant sent to him by mail at Baldwinsville a notice, demanding payment of the taxes, which was duly received by the plaintiff. There was also testimony tending to show that the defendant had sent to the plaintiff a notice by mail directed to him in the



town of Wendell, but a question whether such notice was sent, was submitted to the jury, and they found that it was not.

The plaintiff contends that the notice was defective in form, and that it should have been served on him personally, or, if sent by mail, should have been directed to him in the town where he resided on the first day of May in the year in which the tax was assessed.

We assume, without deciding, that the notice was sufficient in form and substance, but we think that it was not served as required by the statute in force at the time when the demand was made.

The levying and collecting of taxes is a purely statutory matter, and persons arrested for the non-payment of taxes have a right to require that the provisions of the statute shall be strictly followed. The law requires as the foundation for an arrest for non-payment of taxes, or for the distraint of personal property, or the sale of real estate a demand for their payment. Formerly this demand had to be made on the taxpayer in person. St. 1785, c. 70, §§ 2, 5. The Revised Statutes added a provision that it could be made at the place of usual abode (Rev. Sts. c. 8, §§ 3, 11), and the General Statutes added the qualification "if to be found within their precincts." Gen. Sts. c. 12, § 3. The statute as it thus stood was re-enacted in Pub. Sts. c. 12, §§ 4, 14, and again in the codification of the statutes relating to the collection of taxes in St. 1888, c. 390, §§ 8, 18. Then came St. 1889, c. 334, §§ 1, 4, which provided that demand should be made by causing a statement of the amount of the tax with a demand for its payment to be given to the person assessed, or to be sent to him post-paid through the mail directed to the city or town where he resided on the first day of May in the year in which the tax was assessed. The question is what was meant by the words "by causing to be given . . . to the person assessed", it being plain that the notice that was sent by mail was not directed as required by the statute. The provision is used as the alternative of that relating to sending notices by mail, which would seem to exclude the sending of notices by mail except in the particular manner therein specified, and to require that the language should be construed as meaning the delivery of a notice to the taxpayer in person. It is possible, of course, to construe the alternative

intended by the statute as that between causing notice to be actually given to the taxpayer and that sent by mail; in other words, between actual notice and notice by mail which may be actual or not. The object of the Legislature was to secure notice to the taxpayer, and it was for the Legislature to say how notice should be given, and what should be regarded as sufficient notice. But for many years through successive re-enactments the notice required had been a personal notice or a notice left at the last and usual place of abode and it seems to us that the statute will have the meaning intended by the Legislature, if it is construed as authorizing in addition a notice by mail in the manner therein prescribed. As the statutes now are (R. L. c. 13, §§ 1, 3) the service would have been sufficient, but as we have already said the question is to be decided according to the statutes in force at the time when the demand was made.

Although the report speaks of setting aside the verdict, we infer that the *status quo* has been so far preserved that judgment can be entered on the verdict. If not judgment will have to be entered as by agreement of the parties for the amount of the verdict.

*Ordered accordingly.*

*D. Malone*, for the defendant.

*F. L. Greene*, (*W. A. Davenport* with him,) for the plaintiff.



JAMES E. GILGAN, administrator, *vs.* NEW YORK, NEW  
HAVEN, AND HARTFORD RAILROAD COMPANY.

Worcester. September 28, 1903. — February 26, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Negligence, Employer's liability. Railroad.*

A flagman in a freight yard, whose duty it is to tend switches, assumes the risk of being run down, while throwing a switch, by a train which is backing slowly in obedience to a signal given by him, where the accident is due to his miscalculating the speed at which the train is moving and his ability to throw the switch in time to get out of the way safely, and where there is nothing to show negligence on the part of the engineer.

TORT, under the employers' liability act, for the conscious suffering and death of the plaintiff's intestate. Writ dated April 21, 1902.

At the trial in the Superior Court *De Courcy, J.* at the close of the evidence ruled that the plaintiff could not recover and ordered a verdict for the defendant. The plaintiff alleged exceptions.

*G. S. Taft, (E. I. Morgan & R. A. Stewart with him,)* for the plaintiff.

*A. P. Rugg,* for the defendant.

MORTON, J. This is an action of tort under R. L. c. 106, §§ 71, 72, by an administrator to recover damages for the conscious suffering and death of his intestate, one John Gilgan, caused, it is alleged, by injuries received in the defendant's service through the negligence of one Haskell an engineer in control of a locomotive engine in the defendant's employment.

The intestate was a flagman and also tended certain switches. Whether or not he was required to tend the switches as part of the work for which he was originally hired is immaterial. He had done it, as there was testimony tending to show, for about a year under circumstances which would have warranted a finding that it had become a part of his duty, and we assume that when injured he was acting within the scope of his employment. The accident happened on the morning of January 16, 1902. An engine with a long train of cars attached to it and operated by the defendant was backing down from one freight yard in the city of Worcester to another. It was backing slowly, from four or five to eight miles an hour and in obedience to a motion to that effect given to the engineer by Gilgan. On the track on which the train was backing down, another train was approaching. Gilgan gave the engineer of that train a motion to stop and he did so. Between the two trains was a cross-over which enabled the train that was backing down to pass from the east main or outward bound track on which it was, and on which the approaching train stood, to the west main or inward bound track. In order to use the cross-over it was necessary to throw two switches. Gilgan had been in the habit of throwing them for the purpose of allowing trains to make the cross-over almost daily, as the testimony tended to show, and sometimes several

times a day for a year or more. As the train backed down Gilgan threw the first switch, and then continued along ahead of the train "at a good trot," as one of the witnesses testified, for the purpose of throwing the second one. He reached the switch a short distance ahead of the train and while in the act of throwing the switch was struck by the tender and received the injuries from which he subsequently died. The distance between the handle or lever operating the switch and a beam projecting from the rear end of the tender was between fifteen and sixteen inches when the handle was down and was two inches less when the handle was in position for operating the switch.

We assume that the plaintiff's intestate was injured while in the act of throwing the switch, and not while attempting to get upon the foot board of the tender, as there was some testimony tending to show might have been the case. But we think that there was nothing tending to show negligence on the part of the engineer of the engine that was backing down. He was backing down as motioned to do by the plaintiff's intestate. The speed, from five to eight miles an hour, was not excessive, and the attention of the engineer was rightly directed to the care of his engine, and the train which he was backing. He knew that the plaintiff's intestate was a man of experience, and he may well have supposed that he was competent to look out for himself and that he would do so. No doubt he was bound to exercise a reasonable regard to the safety of Gilgan, but there is nothing, it seems to us, that shows that he was at fault for the accident. In making the cross-over his movements were subject to Gilgan's direction and control, and in the absence of any direction or warning from Gilgan that he was going too fast or to slow up still more, he may well have supposed that he was proceeding in a proper manner. He himself, as we understand the situation, was on the side of the engine opposite to the switch where Gilgan was, but there is no contention that the fireman who was on the side next to Gilgan was not looking out for the signals, if any, that might be given. It would seem that Gilgan miscalculated the speed at which the train was moving that was backing down, and his ability to throw the switch in the time that he had to do it in, and get out of the way safely. For this no one was to blame except himself. He was not required to throw the

switch in the face of a manifest danger, and if he attempted to do it and was injured, the defendant cannot be held liable. His declarations that he was run down have no tendency to show that the risk was not an obvious one, or, in view of what clearly appears from the plaintiff's evidence, to show that the engineer was careless. See *Goodes v. Boston & Albany Railroad*, 162 Mass. 287; *Coombs v. Fitchburg Railroad*, 156 Mass. 200.

*Exceptions overruled.*

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ORLANDO DRAPER & others vs. MAYOR OF FALL RIVER  
& others.

Bristol. October 26, 1903. — February 26, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Municipal Corporations. Fall River.*

Under the revised charter of the city of Fall River, St. 1902, c. 393, the mayor of that city has no authority to order the construction of a sewer without a previous adjudication by the board of aldermen. The fact, that an appropriation has been made in general terms for sewer construction and that the superintendent of streets has been authorized to expend it under the general control and supervision of the mayor, does not give the mayor authority to construct a sewer without an adjudication by the board of aldermen that it is necessary for the public health or convenience.

Under the revised charter of the city of Fall River, St. 1902, c. 393, the board of aldermen, as successors of the mayor and aldermen, have charge of the construction of sidewalks including the laying of curbstones, but if in a particular case the aldermen neglect to order curbing to be laid where it is necessary to render a street safe and convenient for travel, the mayor may direct the superintendent of streets to lay the curbing, or the surveyor of highways may lay it of his own motion.

Changing the surface of Durfee Street in Fall River from macadam to granite block paving, and the surface of Granite Street in the same city from cobblestones to a brick pavement, were held to be specific repairs which must be authorized by the board of aldermen under the revised charter of that city, St. 1902, c. 393, as distinguished from ordinary repairs of an administrative nature which might be ordered by the mayor to be made by the superintendent of streets.

A petition of not less than ten taxable inhabitants, under R. L. c. 25, § 100, is the proper remedy to restrain the mayor of a city from expending money or incurring obligations in behalf of the city for the construction of certain sewers and sidewalks and the paving of certain highways, ordered by the mayor in excess of his authority.

MORTON, J. This is a petition by more than ten taxable inhabitants of the city of Fall River, including a majority of the board of aldermen, against the mayor, the superintendent of streets and the city treasurer to restrain the mayor from ordering the construction of certain sewers, sidewalks, curbing, paving and highway repairs except as authorized by the board of aldermen, and the superintendent of streets from proceeding with the work as ordered by the mayor, and the city treasurer from making any payments on account of the matters complained of. The mayor demurred and answered generally. The other two defendants answered generally without demurring. The case was sent to a master to hear the parties and report the facts and so much of the evidence as might be required to raise any question of law as either party requested. Upon the coming in of the master's report the defendants filed exceptions thereto which were overruled so far as they related to questions of fact. The demurrer was also overruled, and the case was reserved for the full court upon the bill, answers, master's report, and the evidence annexed thereto and the defendants' exceptions so far as they raised questions of law;—such disposition to be made of the case as the full court should deem meet.

The questions raised relate to the respective powers of the mayor and the board of aldermen under the revised charter of the city of Fall River, St. 1902, c. 393, in regard to the repair and paving of streets and highways, the construction and curbing of sidewalks and the building of sewers.

The scheme of the charter is that the administration of all the fiscal, prudential and municipal affairs of the city, except as otherwise provided, shall be vested in an executive department consisting of the mayor and a legislative department consisting of the board of aldermen. Neither shall exercise any powers belonging to the other. The executive powers of the city are vested solely in the mayor and are to be exercised by him through various departments and officers who are subject to his supervision and control. Amongst these departments is the street department, under the charge of the surveyor of highways who is also the superintendent of streets. No contract in excess of \$200 can be made by any of these departments or officers unless it is in writing and accompanied by a bond and both the contract

and bond are approved in writing by the mayor. The legislative powers are vested in the board of aldermen who it is also provided shall have "First. The powers of towns, the powers of boards of aldermen, and of the mayor and aldermen and city councils of cities under general law. Second. The powers now held by the city of Fall River, or by the city council, the aldermen, or the mayor and aldermen of Fall River by special laws. Third. The exclusive power to lay out, locate anew, alter, widen and discontinue town ways, streets and highways, and to order specific repairs or a change of grade therein, in the manner provided by law." St. 1902, c. 393, § 15. Damages are to be assessed by the board and any person aggrieved shall have the remedy provided by law in such cases. No member or committee is to take any part in the expenditure of public money, the employment of public labor, or the purchase of public supplies or materials or the making of public contracts, or in the construction, alteration or repair of any public property or the care, custody or management of the same or generally in the conduct of the administrative or executive business of the city. There is also a general provision that no expenditure shall be made or liability incurred by any officer or board on account of the city beyond the amount appropriated therefor in the annual appropriation order, or in a subsequent appropriation.

Pursuant to the power vested in them, the board of aldermen passed an annual appropriation order in February, 1903, appropriating certain sums for highways, paving, curbing, and sewer construction and also adopted the following vote: "Ordered, that the several boards and officers under the general supervision and control of the mayor be and they are hereby authorized to expend the appropriation as hereinafter designated. Superintendent of streets. Appropriation for highways. Appropriation for highways, curbing. Appropriation for paving. Appropriation for sewers, construction. Appropriation for street lights." No question arises over the street lights, nor as we understand it does any question arise over the unexpended balance of appropriations made by the previous government for the construction of sewers ordered by them and not completed. The mayor proceeded without any further action on the part of the board of aldermen to order the superintendent of streets to construct cer-

tain sewers and to lay certain curbing and to do certain paving and admits his purpose to order other sewers to be built and more curbing and paving to be laid, claiming the right to do so as the executive officer of the city. Some of the work thus ordered has been done and paid for and contracts have been made for materials and supplies and the superintendent of streets in his answer admits that he feels bound to obey the orders and directions of the mayor. The city treasurer, as the master finds, intends to pay for the work ordered by the mayor, so far as the bills come to him properly audited, unless restrained by the order of the court. The mayor contends that after the appropriations were made and the vote referred to above had been passed all that remained to be done was of an administrative or executive nature, and that it came within the scope of his authority under the charter to direct the superintendent of streets what sewers to build and what curbing and paving to lay and what highway repairs to make. In regard to the matter of sewers he makes the further contention that Mr. Phinehas Ball of Worcester was employed by the city authorities many years ago to devise a system of sewerage for the city, and made a report which was accepted by the city, and in accordance with which sewers have since been built, and that an appropriation for the construction of sewers is for sewers to be built in accordance with this plan, and that for this reason also the work of constructing sewers is purely administrative or executive. But this contention is disposed of, we think, by the finding of the master, which was warranted by the evidence, that the plan had not been so adopted by the city that "the building of sewers from time to time in accordance with the plan has become a purely executive or ministerial function, to be performed by the executive officers of the city of Fall River after a general appropriation has been made for sewer construction without the previous action of the proper body having the determination under the law of what sewers public convenience and safety require, and where and how they shall be built."

The petitioners contend that it is for the board of aldermen to decide what sewers shall be built and where, and how they shall be constructed and what curbing and paving shall be laid, and what sidewalks and repairs, so far as they are specific or involve changes in established grades, shall be made.



They do not contend as we understand them that the surveyor of highways and the superintendent of streets would not have authority either under the supervision and control of the mayor or of their own motion to make such ordinary repairs, including in some cases the laying of curbing and paving, as might be necessary to render the streets reasonably safe and convenient for travel, and keep them in a proper condition of repair. If such is their contention, then we are of opinion that it cannot be sustained. The ordinary repairs which are required to keep streets and highways in a safe condition for travel are plainly matters of an administrative nature. By the express language of the charter, authority in regard to specific repairs and changes of grade is vested exclusively in the board of aldermen, (St. 1902, c. 393, § 15, cl. 3,) but ordinary repairs are left in the hands of those charged with the duty of keeping the streets in a suitable condition for travel.

As already observed, the charter provides that the powers of towns and of boards of aldermen, and of the mayor and aldermen and of city councils under general laws shall be vested in the board of aldermen. Authority to construct sewers and to take land if necessary is derived from general laws. The Revised Laws, which were in force when the present charter was adopted, provide that "The mayor and aldermen of a city and the sewer commissioners, selectmen or road commissioners of a town may lay, make, repair and maintain all such main drains or common sewers as they adjudge necessary for the public convenience or the public health," etc. R. L. c. 49, § 1. Under former charters granted to the city this power was expressly conferred upon the mayor and aldermen. St. 1854, c. 257, § 15. St. 1885, c. 270, § 20. The authority thus conferred by general laws is given, so far as cities are concerned, to the mayor and aldermen, and as we have seen the revised charter expressly gives to the board of aldermen the powers given to the mayor and aldermen under general laws. It follows that the power to say what sewers shall be built, and how they shall be constructed is vested in the board of aldermen and not in the mayor. The fact that an appropriation has been made in general terms for sewer construction and that the superintendent of streets has been authorized to expend it under the general supervision and control of the mayor does not convert

the laying and building of sewers from an administrative into an executive matter. Before or as a part of the order requiring a sewer to be laid and constructed the board of aldermen is required in some form, expressly or impliedly, to adjudge that it is necessary for the public health or convenience. They cannot, if they would, depute this power to the mayor and the superintendent of streets. *Collins v. Mayor & Aldermen of Holyoke*, 146 Mass. 298, 307. It is given to them and to no one else, and is a legislative or judicial rather than an administrative or executive power. The fact that the charter forbids members of the board of aldermen to take part in any public contract, or in the conduct of any executive or administrative business, has no more tendency to show that it is not for them to decide in regard to the laying and making of sewers, than it has to show that it is not for them to locate and lay out streets. The two things are entirely separate and distinct. Neither does it help the matter that the sewers which the mayor has ordered to be built are in fact (if it is a fact) necessary for and will tend to promote the public health or convenience. That, as already observed, is a matter for the board of aldermen and not for him, to pass upon. The bill alleges and the answer admits that the mayor has ordered the superintendent of streets to build certain sewers which are specifically described without any adjudication by the board of aldermen that they are necessary for the public health or convenience. It follows from what has been said that the orders thus given were unauthorized and invalid and that action under them should be restrained if the remedy chosen is the proper one, which will be considered later.

We come next to the questions relating to curbing and paving. It is provided by R. L. c. 49, § 43, that "if the city council of a city . . . accepts the provisions of this section or has accepted the corresponding provisions of earlier laws, the mayor and aldermen . . . may, if in their judgment the public convenience so requires, grade and construct sidewalks and complete partially constructed sidewalks in any street, with or without edgestones, may cover the same with brick," etc. This in the case of cities puts the construction of sidewalks into the hands of the mayor and aldermen. *Attorney General v. Boston*, 142 Mass. 200. And we do not see how the question of curbing can be separated from

that of construction. The laying of curbing is included in and is part of the construction of sidewalks. The statute expressly recognizes it by giving to the mayor and aldermen the power to construct sidewalks and to complete partially constructed sidewalks with or without edgestones. The answer denies that § 43 has been accepted by the city council, but admits that the corresponding provisions of the earlier laws were accepted. The result is, therefore, that under the section of the revised charter referred to in connection with sewers, St. 1902, c. 393, § 15, cl. 1, the matter of curbing is in the hands of the board of aldermen and not in those of the mayor. If, however, the board of aldermen omit or neglect in any particular instance to order curbing to be laid, and it is necessary that, in order to render the street safe and convenient for travel curbing should be laid, then the mayor acting under the authority given to him as the executive officer of the city and the obligation imposed on all cities and towns to keep their streets and highways in a reasonably safe and convenient condition for travel may direct the superintendent of streets to lay it or the surveyor of highways may lay it of his own motion, on the same ground on which, if the authorities having the right to order specific repairs neglect to do so in a case requiring a change of grade, those charged with the duty of repair may do what is necessary to make the way reasonably safe and convenient. *Sullivan v. Fall River*, 144 Mass. 579. The master has found that, in Warren Street, which is one of the two instances in which it is specifically charged that the mayor has ordered curbing to be laid by the superintendent of streets, curbing was necessary to render the sidewalk, which was there, safe, and to keep it in proper repair. In regard to the other, Beach Street, he finds that it was reasonably proper but was not necessary to make the street safe. We think that it was within the scope of the mayor's authority, under the general obligation imposed on cities and towns to keep their streets and highways reasonably safe and convenient for travel, to order the curbing to be laid down in the first case, but not in the second. It is immaterial whether in obeying the order in the second case the defendant Thurston acts, or proposes to act, as surveyor of highways or superintendent of streets or in both capacities. The order of the mayor can derive no validity from

the fact that Thurston proposes to carry it out in one capacity rather than another.

We think that the repairs which have been ordered in Durfee and Granite Streets must be regarded as specific rather than ordinary repairs. What will constitute ordinary repair and what specific must to some extent be a matter of degree. No clear rule can be laid down for all cases. No change of grade is contemplated by the orders that have been given in regard to these two streets. But in each case the entire surface of that portion of the street used for vehicles for the specified distance will be removed to a greater or less depth and another surface of different material, and at, no doubt, considerable cost, substituted. Durfee Street is a macadamized street and a granite block paving is to be put down. Granite Street is paved with cobblestones and a brick pavement is to be substituted. A material alteration is thus to be made in the construction of each street. All changes in the surfaces of streets, or of the materials of which they are composed, do not necessarily come under the head of specific repairs. Much latitude in the choice of materials and manner of construction must necessarily be allowed to those charged with the duty of repair. But we think that substantial and important changes, like those in these instances, which are not merely incidental to a reconstruction rendered necessary by the increased use of the street or other causes, but constitute a radical difference of treatment, must be regarded as specific rather than general repairs. *Bigelow v. Worcester*, 169 Mass. 390. Otherwise it would be within the power of the surveyor of highways or of the mayor and the superintendent of streets to make over the streets as they saw fit without any limit, except that of the appropriation. We cannot think that the Legislature intended that the board of aldermen should have no voice in such matters beyond the making of the appropriations.

If the effect of the construction thus given to the charter shall be, as the respondents contend it will be, to take away from the mayor powers which the Legislature intended that he should have, it will be for the Legislature to apply the remedy, and not for us to do so by a forced and unnatural construction of the language used. It is to be presumed that the board of aldermen will be governed by a regard for the public interests, and will

order the making of such changes and improvements from time to time as may be required, and as they deem warranted by the state of the city's finances. Provisions almost identical with those contained in the charter before us in reference to the powers of the mayor and the board of aldermen are to be found in several charters recently granted to other cities, though in one or two the legislative body is called a council or city council instead of a board of aldermen. St. 1903, c. 345, Medford. St. 1900, c. 323, Gloucester. St. 1900, c. 427, Northampton. St. 1899, c. 162, Melrose. St. 1899, c. 240, Somerville. We do not discover in these and other charters any intention on the part of the Legislature to increase the executive powers at the expense of the legislative, but a purpose to separate the two, and to place upon the mayor the responsibility for the proper discharge of duties pertaining to executive matters, and to confine members of the legislative body to the performance of duties connected with that branch of the government.

The respondents contend lastly that the remedy is by petition for a writ of certiorari, and not by a petition under R. L. c. 25, § 100, which this is. But the case presented is one in which an officer of the city, the mayor, is about to expend money or incur obligations purporting to bind the city in a manner in which the city has no legal right to expend money or incur obligations, and therefore comes within the express language of the statute.

*Injunction to issue; decree to be settled by a single justice.*

*H. A. Dubuque*, for the defendants.

*A. S. Phillips*, for the plaintiffs.

WILLIAM D. SILVA, administrator, vs. NEW ENGLAND  
BRICK COMPANY.

Bristol. October 27, 1903. — February 26, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Practice, Civil, Amendment. Employers' Liability Act.*

Under the employers' liability act, R. L. c. 106, §§ 72, 73, an action for causing the death of an employee after conscious suffering must be brought by his legal representatives, while for causing his instant death an action can be brought only by his widow, or if he leaves no widow, his next of kin, who were dependent upon his wages for support. A declaration by an administrator under that act alleged that the plaintiff's intestate was killed instantly and that he "left no widow but three children for whose use and benefit this action is brought." The plaintiff asked to amend by substituting as plaintiffs the widow and children of the deceased and alleging that they were dependent upon his wages for support. The trial judge ruled that the amendment introduced a new cause of action and the court had no power to allow it. *Held*, that the ruling was wrong, and that the court had power to allow the amendment. The mistake of the plaintiff was not in regard to the cause of action but in regard to the party in whose name the action should be brought.

MORTON, J. This is an action of tort under the employers' liability act, so called, brought by the plaintiff as administrator of the estate of Linnel da Cunha who was killed by the caving in of a bank of clay in the brick yard of the defendant where he was employed. Due notice of the time, place and cause of injury were given as required by statute. The declaration alleges that the deceased was instantly killed, and at the trial it appeared that such was the case. Thereupon the defendant moved that a verdict be directed for it on the ground that the action could not be maintained by the administrator. The plaintiff moved to amend his writ, by inserting as plaintiffs the names of the widow and children, and alleging that they were dependent upon his wages for support, and that the action was brought for their benefit. This motion was denied on the ground that it introduced a new cause of action, and the court had no power to allow it, and a verdict was ordered for the defendant. The plaintiff duly excepted to these rulings. The case is here on a report made by the presiding judge at the

request of the parties. If the court had the power "to allow the amendment, then appropriate amendment is to be made, and the case stand for trial. If not, judgment is to be entered upon the verdict."

We think that the court had power to allow the amendment. The declaration alleges in so many words "that said deceased left no widow but three children for whose use and benefit this action is brought." This, taken in connection with the further allegation that the deceased was instantly killed, shows, it seems to us, that the cause of action intended to be relied on was the right of recovery given by the statute to the next of kin in cases of instant death. The fact that the death is alleged to have been instant shows that the cause of action intended to be relied on could not have been the right that is given to the administrator to recover for death in cases where the death is not instantaneous, or where it is preceded by a period of conscious suffering. The mistake arose, not in regard to the nature of the cause of action, but in supposing that the administrator was the party in whose name the action should be brought. And in such a case it is plain that the court has power to allow an amendment bringing in the proper parties. *Adams v. Weeks*, 174 Mass. 45. *Lewis v. Austin*, 144 Mass. 383. *Hutchinson v. Tucker*, 124 Mass. 240.

*Appropriate amendments to be made and case to stand for trial.*

*C. C. Hagerty, (F. S. Hall with him,) for the plaintiff.*

*W. I. Badger, for the defendant.*

## EDWIN DORMAN &amp; others vs. ALICE H. DORMAN &amp; others.

Essex. November 4, 1903. — February 26, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, &amp; BRALEY, JJ.

*Release.*

The widow and children of one deceased, in settling a claim of his mother upon his estate, which his estate was insufficient to pay in full, executed a release under seal of all their claim upon the estate of the mother if she died intestate. The mother so died, and, four years after her estate had been settled, new assets were discovered consisting of a savings bank deposit in the mother's name. The widow and children of the deceased son claimed their distributive share in this deposit, on the ground that its existence was not known when they executed the release. *Held*, that, to establish such a claim, they must show that, if the deposit had been known when the settlement with the mother was made, it would have been included in the settlement as a part of the mother's estate, and, as this did not appear, the release must be held to be a bar to their claim, and, in a suit in equity brought by the other children of the mother, the widow and children of the deceased son were enjoined from asserting a claim to their distributive share of the deposit.

MORTON, J. The defendants are the children and widow of Benjamin H. Dorman a son of Sarah R. Dorman deceased. The plaintiffs are the surviving children of said Sarah. At the time of his death Benjamin was owing his mother upwards of \$6,510 of which his estate could pay only twenty-five per cent. The widow was appointed administratrix of her husband's estate and in settlement of the claim of the mother paid her \$3,507.50 in cash and agreed to pay a bill of \$200 which the mother was owing, making \$3,707.50 in all. This sum was arrived at by deducting from the amount due from the son's estate \$1,000 given by the mother as a gratuity and the further sum of \$1,802.50 which was estimated to be the share of her estate to which the defendants would be entitled if the mother were deceased intestate. Thereupon the mother assigned her claim against the estate of the son to Alice H. Dorman one of the defendants and in consideration thereof the defendants executed an instrument under seal binding themselves not to make any claim to any part of the estate of which the mother should die possessed. This was in 1892. The mother died in 1895 and an administra-



tor was duly appointed and filed what was supposed to be a final account in 1897. Afterwards in 1901 new assets were discovered consisting of a deposit in the Lynn Institution for Savings belonging at the time of her death to the mother. Thereupon the defendants filed a petition in the Probate Court seeking to have a portion of the newly discovered assets distributed to them as heirs at law of the said Sarah R. Dorman and the plaintiffs brought this bill, setting up the release aforesaid, to enjoin them from making any claim to said newly discovered assets. The case was heard by a judge of the Superior Court who made certain findings of fact and rulings of law and ordered a decree to be entered for the plaintiffs, which was done, and the defendants appealed. The judge found, amongst other things, that in making the settlement which was made, all parties acted in ignorance of the deposit in the Lynn Institution for Savings, and under a mistake as to the amount of the estate of Sarah R. Dorman. The judge also found that the deposit amounted at the time when the settlement was made to about \$1,100, and that if it had been added to Sarah R. Dorman's estate it would have increased by about \$275 the amount which was estimated in the settlement to be the share of Sarah R. Dorman's estate to which the defendants would be entitled. But the judge declared that he was unable to find as a fact, that, if the existence of the deposit had been known, one fourth of it would have been credited in the settlement, or that any different settlement would have been made from what was made. That is, as we understand the effect of what is stated, the judge was unable to find upon the evidence before him that if the deposit in the Lynn Institution for Savings had been known to the parties, it would have been included in the settlement as a part of the mother's estate.

The defendants, relying on *Turner v. Turner*, 14 Ch. D. 829 and similar cases, contend that the release is to be construed as applying to what was within the contemplation of the parties when it was executed, and that having been executed in ignorance of the deposit in the Lynn Institution for Savings, it does not operate to deprive them of their distributive shares of that deposit. But this contention necessarily assumes, it seems to us, what the judge was unable to find as a fact, namely, that if

the deposit in the Lynn Institution for Savings had been known it would have been included by the mother as a part of her estate in the settlement. In order to establish their right to distributive shares in that deposit the defendants must assume that if that deposit had been included the settlement would have been carried out on the same basis and in the same way on and in which it was carried out. Very likely it would have been. Indeed it would seem that the more reasonable view would be that it would have increased the willingness of the mother to settle on the basis on which she did, since her estate would have been larger and the additional amount which would have been allowed the defendants would have been small. But the evidence is not before us and in view of the finding or rather of the statement by the judge that he was unable to find that as a fact, it does not seem to us that such an assumption would be warranted. The case is not therefore altogether one of mutual mistake, or of a release executed by the parties in ignorance of certain material facts, and is distinguishable on that ground from the case of *Turner v. Turner, ubi supra*, relied on by the defendants.

No objection has been made that the plaintiffs are not proper parties to bring suit or that they would not be entitled to specific performance.

*Decree affirmed.*

*G. Newhall, (W. E. Dorman with him,) for the defendants Alice H. and William E. Dorman.*

*H. P. Moulton, for the plaintiffs.*

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185	156
187	148

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192	89
192	490

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194	218

RICHARD H. DANA, trustee, *vs.* RICHARD H. DANA  
& others, executors, & others.

Middlesex. December 16, 1903. — February 26, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Devise and Legacy, Construction, Attending circumstances.*

A testator gave to his wife all of his estate "to have, hold and enjoy during her life: with power to change it into any other form of investment that may be deemed by her, beneficial, and to sell and dispose of any or all of it at her pleasure and discretion, whenever she may think it necessary or expedient for her own comfort and happiness, without accountability to any person whomsoever," and then gave the "reversion and residue of my said estate, if any, after my beloved wife's life interest therein, as stated above, is terminated by her decease," to two sisters, the issue of a deceased brother, and a brother in law of the testator. *Held*, that the discretionary power of the testator's widow to expend the principal of the property during her life was unlimited, and that her comfort and happiness for which she was free to use the property included not only physical comfort but mental satisfaction in devoting the money to charitable and philanthropic purposes. *Held, also*, that the fact, that the testator's widow had a private fortune of her own amply sufficient for her support, did not restrict the force of the testator's language. *Held, also*, that, in interpreting the language of the testator, it was proper to consider the extent of his estate, the mode of life in which his family had been reared and the means provided by him during his lifetime for their culture and happiness.

BILL IN EQUITY, filed October 15, 1903, by the trustee under the will of James Greenleaf, for instructions.

The case came on to be heard before *Braley, J.*, who at the request of the parties reserved it upon the bill and answers for determination by the full court, such decree to be entered as law and justice might require.

The will of James Greenleaf was dated November 25, 1863, and was proved October 10, 1865. Omitting the attesting clauses and signatures, it was as follows:

"I, James Greenleaf, of Cambridge, County of Middlesex, State of Massachusetts, do make this my last will and testament; disposing of all my estate of whatever nature now owned or hereafter acquired.

"I. I will that all my just debts be paid.

"II. I give to my beloved wife, Mary Longfellow Greenleaf,

all the residue of my estate of every description, to have, hold and enjoy during her life: with power to change it into any other form of investment that may be deemed by her, beneficial, and to sell and dispose of any or all of it at her pleasure and discretion, whenever she may think it necessary or expedient for her own comfort and happiness, without accountability to any person whomsoever.

"III. The reversion and residue of my said estate, if any, after my beloved wife's life interest therein, as stated above, is terminated by her decease, I give, devise and bequeath absolutely and in fee simple as follows viz. One-fourth part to my sister, Charlotte Kingsman Fuller, now residing in Middletown, Connecticut; one-fourth part to my sister Caroline Augusta Crosswell, now residing in Cambridge, Massachusetts; one-fourth part to the children of my brother Patrick Henry Greenleaf equally, to say, to the children of his son Henry Loring, deceased, to his son James Edward, to his son George Herbert, to his son Charles Ravenscroft, to his daughter Henrietta Tracy, and to his daughter Charlotte; and the remaining fourth part to my brother-in-law and lifelong friend Alexander Wadsworth Longfellow now residing in Westbrook, Maine.

"IV. I appoint as executor of this my will, my friend and partner in business, John Appleton Burnham, now residing in Brookline Massachusetts."

*R. H. Dana*, trustee, stated the case.

*E. M. Parker*, for the executors under the will of Mary Longfellow Greenleaf.

*H. R. Bailey*, for Lucia W. Longfellow and others.

*W. N. Buffum & B. E. Eames*, for the executor under the will of Henrietta Tracy Greenleaf Homer, submitted a brief.

BRALEY, J. Under the pleadings in this case, the question presented by the parties for our decision is, whether under the second clause of the will of James Greenleaf, his wife, Mary Longfellow Greenleaf, took only a life interest in the residue of his estate, with a limited power of disposal of the principal, or a life interest therein, with full power, not only to use the income, but also to expend the principal, either in whole or in part, as she might deem advisable for her own personal welfare and enjoyment. The answer is to be sought for and found in

the intention of the testator, which is to be ascertained from the provisions of the whole instrument.

At the date of the execution of the will, it had been settled, that a testator might make a testamentary disposition of his property, in which he could devise and give a life estate with power to sell in the first taker, and a remainder over in any residue that might be left on the death of the life tenant. *Harris v. Knapp*, 21 Pick. 412. *Lynde v. Estabrook*, 7 Allen, 68. This will may well rest upon the law of these decisions.

His principal purpose was, to make in the first place ample provision for his wife, of whom he speaks in language of affection, and then in clear and sweeping words declares, that after the payment of his debts, she is to take all the residue of his estate, not only to have and to hold, but to enjoy, during her life. She also at her pleasure might change the body of the estate so devised to her into any form of investment that she deemed beneficial, and "sell and dispose of any or all of it at her pleasure and discretion," as she thought necessary "for her own comfort and happiness, without accountability to any person whomsoever." If the testator had stopped here, the language used would have been sufficient to pass a fee. Gen. Sts. c. 92, § 5. *Chase v. Chase*, 132 Mass. 473. But he went further, and in the last clause of his will he speaks of the estate created in his wife by the second clause, as "my beloved wife's life interest therein, as stated above," and then declares that the "reversion and residue of my said estate, if any," at her decease, is devised and bequeathed absolutely, and in fee simple, to certain of his relatives who are specifically named.

It would be difficult to employ language to more clearly and concisely express the purpose and intention of the testator, than the words used by him.

He gave to his wife during her lifetime as absolute and ample a power to dispose of the estate devised as would be possessed by an owner in fee. And it has been decided that such a power may be an incident of a life estate, and legally given to a life tenant. *Johnson v. Battelle*, 125 Mass. 453. *Welsh v. Woodbury*, 144 Mass. 542, 545. *Sawin v. Cormier*, 179 Mass. 420.

If it be assumed from the uncertain and indefinite allegations

in the bill, that of the residue and principal of the estate devised to her, a small part of which it is conceded she has spent in her lifetime, an insignificant portion when compared with the whole, was used by her for charitable purposes, the claim of the petitioner as trustee under his will, that the executors of her will must make good such deficit if it can be found, cannot be sustained.

Her power to spend and use the principal was unlimited. She was to enjoy it during her life, at her pleasure and discretion, and she was not required to render to any person an account of her use of the property. That she had a private fortune of her own, amply sufficient for her support, does not change the legal force of the language employed by the testator, or cut down his clearly expressed intention, by making his purpose depend in any degree upon the fact that she possessed a separate estate. No such limitation is imposed by him; neither was it his design to restrict her to the use of only so much of the principal as might be necessary for her comfortable physical support and existence.

The power of disposal given to her was not for this object alone, though undoubtedly it was in the mind of the testator, and is included in the language used by him. But in addition, she was to spend and enjoy it in the largest manner for her happiness, and nothing appears in the record to raise the suggestion, that in her use of the property, Mrs. Greenleaf wished to deplete the estate of her husband, in order to preserve or increase her own.

If through reasons of religion or of benevolence, and for her mental satisfaction, she chose to devote any part of the estate left to her, in aid of either charitable or philanthropic objects, there is nothing in the terms of his will that restricts her from making such use of the principal; and if the testator did not care to confine her discretionary powers, there is no duty incumbent on us to seek for reasons to limit their exercise.

No general rule can be laid down that will be equally applicable to all cases; as what will be sufficient in one case to render the object of a testator's bounty free from anxiety, in providing means of support, by which contentment and enjoyment are secured and conferred, may under other conditions

be wholly inadequate. The language used by the testator, the extent of his estate, the mode of life in which his family have been reared, and the means provided by him in his lifetime for their culture and happiness, are all to be considered. *Lovett v. Farnham*, 169 Mass. 1. *Stocker v. Foster*, 178 Mass. 591, 599.

It must therefore be held that she took a life estate with a power of disposal in fee, while the devisees and legatees took a vested remainder; though their interest was dependent on the contingency, that the exercise by her of the power conferred might determine their estate. *Blanchard v. Blanchard*, 1 Allen, 223. *Kent v. Morrison*, 153 Mass. 137, 139. *Barnard v. Stone*, 159 Mass. 224, 225.

*Decree accordingly.*

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#### OLD COLONY RAILROAD COMPANY, petitioner.

Suffolk. December 17, 1903. — February 26, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

#### *Damages. Grade Crossing Acts.*

Under St. 1892, c. 433, a special act providing for the abolition of certain grade crossings, which was made subject to the provisions of St. 1890, c. 428, §§ 1-8, so far as they did not conflict with its provisions, the Old Colony Railroad Company, which was compelled to hire money to meet the obligations imposed by the special act, is not entitled to have the interest paid by it for such money allowed as part of the "expenses" of the alterations and improvements to be paid by the railroad company of which the Commonwealth is to repay forty-five per cent of the "cost incurred."

PETITION of the directors of the Old Colony Railroad Company, under St. 1892, c. 433, for the alteration of the grade crossing of Tremont Street in Boston with the railroad operated by that company.

St. 1892, c. 433, related to the abolition of certain grade crossings of the Boston and Providence Railroad.

Section 1 provided that the commissioners who had been appointed to consider the abolition of the Tremont Street crossing should prescribe the manner in which the tracks of the railroad should be raised in order to abolish all the grade crossings of the railroad in the city of Boston.

Section 2 was as follows: "The alterations and improvements prescribed by said commission shall be made by the Old Colony Railroad Company, and the expenses thereof paid by it, and for that purpose it may issue its stock from time to time to such an amount as may be necessary, not to exceed in all the sum of two million dollars; such stock to be sold at public auction."

Section 3 provided that the Commonwealth should "repay to said railroad company forty-five per cent of the cost incurred by said company in carrying out said alterations and improvements, as audited and approved by the auditors" provided for in St. 1890, c. 428.

Section 4 provided for repayment by the city of Boston to the Commonwealth, of thirty per cent of the amount repaid to the railroad company by the Commonwealth in twenty equal annual payments, with interest at the rate of three per cent.

Section 5 was as follows: "Sections one to eight, inclusive, of chapter four hundred and twenty-eight of the acts of the year eighteen hundred and ninety, and all acts additional to or in amendment thereof, shall, so far as they do not conflict with the foregoing provisions, be applicable to all proceedings under this act."

The case came on to be heard in the Superior Court before *Fessenden, J.*, upon a motion of the railroad company to recommit a supplemental report of the auditor to whom the case had been referred.

The motion was as follows: "And now comes the Old Colony Railroad Company, and respectfully represents that as a part of the expenses of making the alterations and improvements required to be made in this case by chapter 433 of the acts of 1892, and chapter 466 of the acts of 1894, it has paid as interest on the several items of expenditures required to be made and made by it under said statutes from the respective dates of the payment of said expenditures to the dates when forty-five per cent of such expenditures were repaid to it under decrees of court providing for such repayment, and as a part of the expenses of making such alterations and improvements, the sum of \$47,282.31, being interest at four per cent paid by it from the proceeds of its stock issued and sold by it from time to time



as provided by said acts, for the purpose of paying such expenses. A detailed statement of said expenditures, with the respective dates and amounts and computations of interest thereon from the time the same were made to the time of repayment, is as follows: [Detailed statement.] Wherefore it asks that said sum of \$47,282.81 may be audited and reported to the court as expenses paid by it in making the alterations and improvements required by said statutes to be made by it."

The judge ruled, as a matter of law, that the claim for interest could not be allowed as a part of the expenses paid by the railroad company. He overruled the motion to recommit and ordered that the report of the auditor be accepted, and, by agreement of parties, reported the case for determination by this court.

*J. H. Benton, Jr.*, for the railroad company.

*R. G. Dodge*, Assistant Attorney General, (*F. T. Field* with him,) for the Commonwealth.

*A. J. Bailey*, for the city of Boston.

**BRALEY, J.** Under St. 1892, c. 488, the Old Colony Railroad Company has made the alterations and improvements called for by the act, and rendered necessary, by the abolition of certain grade crossings of the tracks of the Boston and Providence Railroad Company, according to the plan prescribed by commissioners duly appointed for that purpose under the provisions of St. 1890, c. 428. The expenses of this work were to be paid in the first instance by the railroad company, and for that purpose, it was authorized to issue and sell its stock from time to time, in order to raise the money, but not to exceed an amount named. A certain percentage of these expenses was to be repaid to the company by the Commonwealth, which in turn was to be reimbursed in part by the city of Boston. At reasonable periods of time as the work proceeded, the company presented to the auditor for examination and allowance a statement of its disbursements, and expenses connected therewith, and made a claim in each statement for interest at the rate of four per cent actually paid for money hired by it, to carry out and complete the alterations and improvements directed by the commissioners. In his twenty-first report the auditor states this claim as follows: "Item 5. Interest paid on money ex-

pended in payments for lands taken, damages caused, and construction, all as required to be paid under said acts, the same being interest at four per cent on the several items of expenditures from their respective date of payment, to the dates when the same were repaid under decrees of court providing for repayment thereof." No question is raised that interest has not been paid on the sums named, and at the rate specified. Neither is it claimed, that the postponement of the presentation of the final detailed statement in its entirety, of this demand, has caused any additional burden to the Commonwealth, if it properly can be allowed, as interest is charged as an expenditure only from the date of payment, to the date when a claim could be made for repayment, to the extent of the reclamation permitted against the State.

The St. of 1892, c. 433, was a special act, and it was enacted subject to the provisions of St. 1890, c. 428, §§ 1-8 inclusive, in so far as these sections do not conflict with its terms. It does not appear that the Legislature intended to lay down any different rule under one, from that provided by the other, and the items of cost, for which the company is to be reimbursed, are the same in both acts, though the percentage of the whole outlay to be borne by it is reduced.

The commissioners decide what alterations are necessary for the safety and convenience of the public, and "shall prescribe the manner and limits within which such alterations shall be made and shall determine which party shall do the work," and "the railroad companies shall pay sixty-five per centum of the total actual cost of the alterations, including in such cost the cost of the hearing and the compensation of the commissioners and auditors for their services, and all damages" for the taking of land necessary to carry out the alterations that have been ordered. St. 1890, c. 428, §§ 3-7.

The cost incurred by the company, and for which it is to be finally repaid, are the necessary disbursements required to make the alterations ordered by the commissioners; and to meet this expense, it may pay from funds in its treasury, or issue and sell its stock, or it might go into the market, and hire what was necessary on its negotiable paper.

The special act evidently contemplated paying for the work

from time to time as it proceeded, and upon the report and allowance of the amount due by the auditor.

The ground upon which the petitioners put their claim is, that money paid by way of interest on money used to pay for the alterations is a part of the "actual cost." In a broad sense this is true of a railroad company which is obliged to hire money to meet the obligation imposed by the statute.

Interruption of the regular running of trains caused by extensive changes in its tracks, loss of traffic that is thereby caused, and any consequential and incidental damages arising from the interruption necessarily incident to the adjustment of a railroad system, in whole or in part, to the changes that may be required under these statutes, may not improperly be called an expense to the company so affected.

No illustration can make a distinction stronger than the case itself, for if such an item is to be included either under the term "expense," or that of "actual cost," then there is no logical limit to sweeping into such a classification everything that directly or collaterally calls for expenditure, or cost, or loss by a railroad company that is compelled under the statute to carry out the order of commissioners, when approved by the court, for the abolition of one or more of the grade crossings of its road. That such a construction would open the door to let in claims that would be not only large in amount, but uncertain and contingent in their character, is reasonably clear.

If the Legislature had intended to include such claims as a part of such cost and expenses caused by and arising from the alterations ordered under St. 1890, c. 428, now R. L. c. 111, §§ 149-160, the act would have contained language making this intention clear.

The only attempt to enumerate the items of expense are those named in the statute, and the phrase "actual cost" means the cost of what is described; though where damages are incurred in taking land to carry out the report of the commissioners, counsel fees and extra work done by selectmen, paid by a town in defending or settling a claim for such damages for land taken for the purpose of abolishing grade crossings, have been held to be included. *Boston & Albany Railroad v. Charlton*, 161 Mass. 32.

With this exception, unless "actual cost" and "expense" are to be taken as equivalent in meaning to the expression, full compensation for any and all expenses in whatever form they may be sustained, which is a construction that in view of the language used and the general purpose of the act for the abolition of grade crossings cannot be adopted, it must be held that these words have the limited definition given to them by the statute, and cannot be extended to include the claim of the petitioners. *Mayor & Aldermen of Newton, petitioners*, 172 Mass. 5, 10. *Providence & Worcester Railroad, petitioner*, 172 Mass. 117, 121. *Selectmen of Norwood, petitioners*, 183 Mass. 147. *Selectmen of Westborough, petitioners*, 184 Mass. 107, 111.

*Decree affirmed.*

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HENRY O. CUSHMAN, administrator, *vs.* AARON F. ARNOLD  
& others.

Suffolk. December 18, 1903. — February 26, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Devise and Legacy, Construction.*

A testatrix, after making a large number of pecuniary legacies, provided that, in case her estate should be more than sufficient to pay the legacies in full, the residue should be paid to the several legatees in proportion to their legacies. By a codicil she left a dwelling house for life to one of the legatees named in her will on condition that she should make it her permanent home, and provided that "at her [the life tenant's] decease and before that event if, and whenever she shall have abandoned it as her permanent home, said house . . . shall fall into the rest and residue of my estate and be disposed of as is by said will provided for the disposal of said rest and residue." The estate of the testatrix was sufficient to pay all legacies in full and distribute a surplus among the legatees. The life tenant made the house her permanent home until her death. An administrator *de bonis non* with the will annexed was appointed, and filed a bill for instructions as to the distribution of the proceeds from the sale of the house. *Held*, that the remainders in the proceeds of the house vested in the legatees, including the life tenant, upon the death of the testatrix, and must be determined as of that date.

There is nothing inconsistent in a life tenant holding a vested interest in a remainder to take effect at his death, and the fact that a life tenant is one of a class to take under a will at his decease, is not enough to show that the testator intended the remaindermen to be ascertained at the termination of the life tenancy rather than at the time of his own death.

185	165
189	189
185	165
192	181
185	165
194	218

BILL IN EQUITY, filed May 28, 1903, by the administrator *de bonis non* with the will annexed \* of the estate of Mary Jane Aldrich, for instructions.

The case came on to be heard before *Hammond*, J., who, at the request of the parties, reserved it upon the bill, answers and an agreed statement of facts for determination by the full court, such decree to be entered as equity and justice might require.

Mary Jane Aldrich died on May 13, 1891. Her will was dated April 12, 1884, and a codicil was dated January 13, 1887. Both were proved on June 15, 1891.

The will was as follows:

"Know all Men by these Presents, that I, Mary Jane Aldrich of Boston in the County of Suffolk and Commonwealth of Massachusetts, single woman, being now of sound mind and memory do make this my last will and testament, hereby revoking all former wills by me at any time heretofore made.

"First: I direct all my just debts and funeral charges to be paid out of my estate as soon as conveniently may be after my decease.

"Second: All the rest, residue and remainder of my estate, real, personal, and mixed, I give, devise and bequeath to my mother, Sarah Aldrich, if she survive me, to have and to hold to her, her heirs, executors, administrators and assigns forever.

"Third: If however my mother should not survive me, then after the payment of my just debts and funeral charges, I dispose of my property as follows, viz: "

[Here followed twenty-nine pecuniary legacies, amounting in all to \$88,200, of which the largest was as follows: "5. I give to my friend Sarah Ferris, who has for many years resided in our family the sum of twenty thousand dollars."]

"Should I not have property enough to pay all the legacies above given in full, I direct that the legacy of twenty thousand dollars above given to Sarah Ferris be paid in full and the residue of my property be divided among the other legatees above named *pro rata*. And should there be more than enough to pay all said legacies in full, I direct that the residue thereof

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\* See *Cushman v. Albee*, 183 Mass. 108.

be divided among and paid over to said legatees in proportion to the amount of their several legacies hereinbefore named.

“Fourth : I nominate Sarah Ferris and Sumner Albee aforesaid to be the executors of this will and request that they and each of them be exempt from giving any surety or sureties on their official bonds.

“And I give unto my said executors or whoever may execute this will, full power and authority to sell and convey, either at public or private sale any and all real estate as well as personal property I may own or have any interest in at the time of my decease, and to make, execute, and deliver, any and all necessary or proper deeds and other instruments of conveyance thereof.”

[Here followed the attesting clauses and the signatures.]

The codicil, omitting the attesting clauses and the signatures, was as follows :

“Know all Men by these Presents that I, Mary Jane Aldrich, of Boston in the County of Suffolk and Commonwealth of Massachusetts, do make this codicil to my last will heretofore made and published by me and dated April 12, 1884, which will I hereby ratify and confirm in all respects, save as the same may be changed by this instrument.

“In addition to the provision made in said will for my friend, Sarah Ferris, I give to her, provided I survive my mother, the use and improvement of my house numbered 216 Newbury Street in said Boston, in which we now reside, together with all the furniture, fixtures and articles of household use or ornament, belonging to me which may be in said house at my decease, during the remainder of her natural life, provided she shall reside in said house and make it her permanent home, and keep said house in good repair and pay all the taxes which may be assessed upon the same. And at her decease and before that event if, and whenever she shall have abandoned it as her permanent home, said house, furniture, fixtures and articles of household use shall fall into the rest and residue of my estate and be disposed of as is by said will provided for the disposal of said rest and residue.”

*H. O. Cushman*, administrator, stated the case.

*F. G. Cook*, for the executrix of the will of Sumner Albee.

*G. P. Wardner*, for the executor of the will of Sarah Ferris Devlin.

*A. A. Wyman*, for John F. Aldrich.

*D. L. Smith*, for Aaron A. Haskins, individually, as administrator of the estate of Aurilla Haskins and as executor of the will of Sophia M. Aldrich, submitted a brief.

BRALEY, J. The testatrix, Mary J. Aldrich, died May 13, 1891, leaving a will and codicil which were duly admitted to probate. Apparently Sarah Aldrich, mother of the testatrix, to whom all the rest and residue of the estate was given, did not survive her and the property was divided among a large number of legatees who are specifically named, and for whom the further provisions were made; that if any residue remained after paying all the pecuniary legacies in full, it should be converted into money, and divided among "said legatees in proportion to the amount of their several legacies hereinbefore named." The estate so left was of sufficient value not only to pay all these legacies in full, but to leave a large amount for distribution under the residuary clause of the will. *Cushman v. Albee*, 183 Mass. 108. All the estate has been distributed except the house and land in Newbury Street, which was given by the codicil to Sarah Ferris for life. She is now dead. And the question raised is, whether the proceeds to be derived from a conversion of this property into money in accordance with the provisions of the will and codicil, is to be distributed and apportioned as of the date of the death of the testatrix, or that of the life tenant.

The will and codicil are to be construed together, and form one instrument for the purpose of ascertaining her intention as to the disposition of her estate. *Lyman v. Coolidge*, 176 Mass. 7, 9. *Bassett v. Nickerson*, 184 Mass. 169.

Except so far as she gave to Sarah Ferris, who by a subsequent marriage became Sarah Ferris Devlin, the use for life of the family residence under certain conditions, the provisions of the will were not affected or modified by the codicil.

Nothing is shown in the case to take it out of the ordinary rule, that a remainder after a life estate must be held to have vested at the death of the testatrix, unless from the terms of the will it was clearly her intention that it should not vest,

except upon the happening of the event on which final distribution is to be made. *Peck v. Carlton*, 154 Mass. 231, 233. *Marsh v. Hoyt*, 161 Mass. 459, 461. *Cook v. Hayward*, 172 Mass. 195, 196.

Not only was a life estate given to her, but the life tenant was also made one of the legatees in the will, and is within the class among whom the residue of the entire estate is to be divided. This clause of the will is in legal effect the same as if each legatee had been again named and his or her proportionate share of the residue stated. *Shaw v. Eckley*, 169 Mass. 119, 121.

In other words she was given a fractional interest in a remainder which was subject to the life estate given her by the codicil. But if this part of the estate was not to be divided until her death, while the life estate would not be affected, she could not be personally benefited by such distribution; but the conditions upon which the life estate was to be enjoyed were, that she should reside in the house, keep it in good repair, pay all taxes assessed thereon, and make it her permanent home. If it was abandoned by her as a permanent home, then, as well as at her decease, final distribution was to be made of this part of the estate. Mrs. Devlin might have chosen not to occupy the house, the life interest in which is stated to be given to her in addition to the provision made for her benefit in the will; or after occupancy she might choose to make her home elsewhere. In either event, distribution would immediately follow.

There is nothing inconsistent or repugnant in the gift of a life estate with a remainder to a life tenant, even though such remainder can never come into the possession of the remainderman. *Chesman v. Cummings*, 142 Mass. 65, 70. *Rotch v. Rotch*, 173 Mass. 125, 130.

And this fact is not enough to change the time when the remainder must be held to have become vested. No words of contingency are used, as if she had said the distribution should be among the legatees then surviving, or such as shall be alive at the death of the life tenant; and no intention appears in her scheme for the distribution of her estate as a whole, to make other than a present bequest to the legatees named. Neither does the language used create two classes of legatees: those



who are to take at her death, and those who, if they survive, would take at the death of the life tenant. *Blanchard v. Blanchard*, 1 Allen, 223.

The codicil provides, "and at her decease . . . said house . . . shall fall into the rest and residue of my estate and be disposed of as is by said will provided for the disposal of said rest and residue."

The words "at her decease" are not susceptible of any stronger meaning than if she had said, that this part of her estate should then become the property of the legatees for the purpose of possession and enjoyment, and to which they already had the legal title.

These words do not state a contingency on which their interest was to vest, but merely designate the time when the class called "said legatees" would be entitled to possession of the respective portion of each in the proceeds of the sale.

The death of Sarah Ferris Devlin was the time fixed when this part of the estate of the testatrix was to be converted into money, and distributed to those whose right to receive any portion of it had already vested at the date of the death of the testatrix. *White v. Curtis*, 12 Gray, 54. *Abbott v. Bradstreet*, 3 Allen, 587. *Gibbens v. Gibbens*, 140 Mass. 102. *Loring v. Carnes*, 148 Mass. 223. *Pollock v. Farnham*, 156 Mass. 388. *Harding v. Harding*, 174 Mass. 268.

When the petitioner has converted this house into money according to the terms of the will of Mary J. Aldrich, the net proceeds are to be distributed among the legatees named therein as of the date of her death, and in the proportion that the pecuniary legacy given to each bears to the whole sum of the residue to be divided. The executor or administrator of any deceased legatee named in the will to take his or her portion; and Edward Devlin, trustee under the will of Sarah Ferris Devlin, is to receive the share given to her.

*Decree accordingly.*

## THOMAS W. LAWSON vs. CLARENCE W. ROWLEY.

Suffolk. January 14, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Deposition. Justice of the Peace. Contempt. Prohibition.*

In this case it was assumed, without deciding it, that under R. L. c. 175, § 26, a deposition may be taken when, in the language of *Shaw*, C. J., 14 Gray, 181, the party taking it "fears, apprehends, believes that the witness is going to be absent [from the Commonwealth], and this appears to the magistrate to be reasonable."

A justice of the peace, taking a deposition, has no power to punish a deponent refusing to answer a proper question by commitment to jail for contempt. The remedy in such a case is given by R. L. c. 175, § 11.

PETITION, filed October 20, and amended October 28, 1903, for a writ of prohibition, addressed to the defendant as a justice of the peace, prohibiting and enjoining him from proceeding further with the taking of the deposition of the petitioner in an action pending in the Superior Court between one Torrey E. Wardner and one Albert C. Burrage, from requiring the plaintiff to answer the questions propounded to him by the attorney for the plaintiff in that action, and from committing or punishing the petitioner for contempt on account of his refusal to answer certain questions.

The case came on to be heard before *Braley*, J., who at the request of the parties reserved it, upon the petition as amended and the answer, for determination by the full court. If the respondent, as a matter of law, had no power to commit the petitioner for contempt in accordance with his order as set forth in the petition, or for any limited period of time, the writ of prohibition was to issue; if, as a matter of law, the respondent had power to commit the petitioner for contempt in accordance with his order as set forth in the petition, or for any limited period of time, the petition was to be dismissed.

*W. I. Badger* & *W. H. Hitchcock*, for the petitioner.

*G. P. Wardner*, for the respondent.

KNOWLTON, C. J. The respondent, as a justice of the peace, was applied to under the R. L. c. 175, § 26, to take the deposi-

tion of the petitioner in a pending case, on the ground that the witness was about "to go out of the Commonwealth and not to return in time for the trial." The petitioner refused to answer certain questions propounded to him, and this petition is brought to obtain a writ of prohibition to prevent the magistrate from issuing a process of commitment to jail for contempt in refusing to answer.

If, following the opinion of Chief Justice Shaw in *Livesey v. Bennett*, 14 Gray, 180, we assume without deciding that under this statute all that is necessary legally to justify the taking of a deposition is that the party taking it "fears, apprehends, believes that the witness is going to be absent, and this appears to the magistrate to be reasonable," and if we assume that the magistrate would have found for the plaintiff in the original action upon this point, we come to the question whether a justice of the peace, taking a deposition, may punish a witness by commitment to jail for contempt if he refuses to answer a proper question. The power of justices of the peace has been greatly diminished by the legislation of the last fifty years. By the St. 1858, c. 138, they were deprived of their jurisdiction to try criminal cases. See also St. 1859, c. 193; Gen. Sts. c. 120, § 36. The St. 1877, c. 211, provided that they should no longer have "any power, authority or jurisdiction to try civil cases, or receive complaints or issue warrants." See R. L. c. 161, § 5. But justices of the peace are still conservators of the peace, (R. L. c. 166, § 2,) and they still have power to take depositions, (R. L. c. 175, § 27,) and under § 40 of this chapter, "A person may be summoned and compelled to give his deposition at a place within twenty miles of his place of abode, in like manner and under the same penalties as are provided for a witness before a court," in addition to the liability in an action of tort for damages created by § 4 of this chapter, when a person summoned as a witness at a trial in court fails to attend without a sufficient excuse. Section 5 provides that such failure "shall also be a contempt of the court, and may be punished by a fine of not more than twenty dollars." This provision, under the section referred to above, gives a justice of the peace power to punish by fine, as for a contempt, the failure of a witness to attend on being summoned to give his deposition. There is no express

provision that authorizes him to punish for a contempt in any other way.

The Gen. Sts. c. 120, § 50, following Rev. Sts. c. 85, § 83, gives justices of the peace power to punish either by fine not exceeding \$10, or by imprisonment not exceeding fifteen days, "such disorderly conduct as interrupts any judicial proceeding before them, or is a contempt of their authority or person." Probably wilful disobedience of an order to answer a question would be such disorderly conduct, and would justify imprisonment for contempt committed in the trial of a case; but this provision now applies only to trial justices. Pub. Sts. c. 155, § 68. It has never been decided that it was applicable to a proceeding for taking a deposition, and if it could have been held so applicable when justices of the peace had large judicial authority, we are of opinion that it ought not so to be held since the repeal of the original provision and its re-enactment in a form which applies only to trial justices.

The St. 1826, c. 86, § 4, which gave justices of the peace express authority to commit witnesses to jail for a contempt if they unreasonably refused to answer interrogatories in giving a deposition, was repealed by the Revised Statutes of 1836, and was not re-enacted in the revision.

The R. L. c. 175, § 11, is very broad and general, and we are of opinion that it was intended to apply to cases like the present. It is as follows: "A justice of the supreme judicial court or of the superior court, upon the application of a magistrate or tribunal which is authorized to summon and compel the attendance of witnesses may, in his discretion, compel the giving of testimony by them before such magistrate or tribunal, in the same manner and to the same extent as before said courts." In terms it includes magistrates as well as tribunals, and there is no good reason why it should not apply to a justice of the peace acting as a magistrate in taking the deposition of a witness whom he has summoned and whose attendance he has compelled. Under this statute the judge can act only upon the application of the magistrate or tribunal, *First National Bank of Chicago v. Graham*, 175 Mass. 179, and then he may exercise his discretion according to the justice of the case. In this way a witness who might be justified in refusing to answer irrelevant questions calling for an

injurious disclosure of the secrets of his business or his family would be likely to be protected by the judge, while a magistrate, taking a deposition, if he had the power to commit for contempt, might think it his duty to compel answers to all questions of doubtful competency. We think our existing laws should be so construed as to leave justices of the peace taking depositions with no power to commit a witness for contempt for his refusal to answer the questions put to him.

*Writ to issue.*



JAMES E. GRAVES *vs.* WILLIAM G. BROUGHTON.

WILLIAM G. BROUGHTON *vs.* JAMES E. GRAVES.

Essex. January 14, 15, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Evidence, Extrinsic affecting writings. Husband and Wife. Easement. Way. Practice, Civil, New trial.*

Oral evidence of the actual occupation and use of land by different owners is admissible to show what was meant by the words "in front of the house" in a series of deeds conveying respectively the lower half and the upper half of "the small piece of land in front of the house."

A husband cannot acquire by prescription a right of way over land of his wife who is living with him on adjoining land of his own.

Where, in two cases tried together involving various issues, exceptions were sustained upon one issue only, it was ordered that the new trial should be confined to that issue.

BRALEY, J. These are actions of tort in the nature of trespass brought respectively June 30 and July 20, 1900, to determine the title of the parties who are owners of contiguous estates, to a small strip of land in the immediate vicinity of their houses, and also the right of Graves to a way across the premises of Broughton to Harding's Lane in the town of Marblehead.

At the trial in the Superior Court verdicts were rendered in favor of Graves, and the cases are here on the exceptions of Broughton to a refusal to make certain rulings requested by him, and to the instructions given to the jury.

The alleged acts of trespass were the erection of a stone wall by Broughton on the strip of land in controversy by which the use of the way was cut off, and the alleged tortious act of Graves in tearing down a part of the wall, in order to obtain access to the way.

Neither of the litigants was able to establish his title, either to the land or to the easement claimed, by the terms of any express grant, and as the facts relied on to prove title by possession to the land do not necessarily tend to establish the right of way, it becomes advisable to consider the questions presented for decision separately.

The estate now owned by Broughton was formerly held in common by William Hammond, Nancy Meservey and Joseph W. Hammond. In 1831 by an indenture of partition they made a division of the property so that William and Nancy should be "seised and possessed of one undivided moiety," and Joseph of the "other moiety." These parts were respectively treated in subsequent conveyances by the tenants as held in severalty, and are referred to as the "lower half" and "upper half" of the premises. *Sparhawk v. Bullard*, 1 Met. 95, 99. *De Witt v. Harvey*, 4 Gray, 486, 491.

At the date of the partition the estate consisted of a small parcel of land, on which stood a dwelling house and outbuildings, but no description is given of its boundaries. The language used after designating the rooms of the house that formed the lower half, being, "together with one half of the small piece of land in front of the house, viz., that part which is below the bank or break in said land," and with the remainder of the house, the other tenant "shall have the upper half of said piece of land in front of the house." This description has never been changed in later deeds passing title to the land.

Under such general terms, resort must be had to parol evidence to ascertain what was meant by the words used, and the actual occupation and use of the land by different owners became admissible in evidence to determine the boundaries and the extent of the ownership of each tenant. *Stone v. Clark*, 1 Met. 378.

The title of James E. Graves to his homestead, which as he claimed included the land in dispute, came from his father

Eleazer T. Graves, who owned and used it at least from September 24, 1849, to September 24, 1886, when he conveyed it to his son, who has since been in possession. During this period Eleazer T. Graves lived with his wife Olive Graves, who owned the upper half of what is now the property of Broughton. For a portion of the same time John B. Graves, father of Eleazer T. Graves, owned and occupied the lower half of the same estate, and there was evidence at the trial that an iron stake set in the ground about fifteen and one half feet from the westerly side of the house of James E. Graves was the boundary of his land on the west side, and if so bounded his premises would include the strip in issue, and that it was placed as marking the line of division by Eleazer T. Graves and John B. Graves not later than May 14, 1869.

There was other evidence introduced by both parties not necessary to be recited, bearing upon the issue as to where the boundary line ran between the two estates, and which became a question of fact for the jury.

If the iron stake marked the dividing line, the wall was on the land of Graves, who was entitled to have his damages assessed for its unlawful construction and maintenance by Broughton. *Wishart v. McKnight*, 178 Mass. 356.

The instructions given on this branch of the case directed the attention of the jury to the uncertain character of the words of description used in the various deeds, and to the fact that evidence had been admitted solely to show what was intended to be included or described by the words "in front of the house" when applied to the land conveyed, and to fix the boundary line between the different portions. The instructions carefully pointed out the application of the evidence to the issue to be decided and no error of law appears.

There was sufficient evidence in the case to sustain the finding of the jury that at the time the wall was built James E. Graves was "the owner or in possession of the strip of land on which the wall in question stands."

It was conceded at the trial, that if a right of way across the land of Broughton was appurtenant to the estate of Graves, the easement had been acquired by prescription under an adverse user of the servient estate by Eleazer T. Graves.

A title by prescription rests upon the fiction of a lost grant, and it must appear that the owner of the estate which is to be subjected to the servitude, and who has the right to interrupt an acquisition of the easement, could have asserted his title against the owner of the dominant estate. *Barnes v. Haynes*, 13 Gray, 188. *Melvin v. Whiting*, 13 Pick. 184, 188. *Powell v. Bagg*, 8 Gray, 441, 443.

For a period of thirty-seven years during which Eleazer T. Graves owned and occupied the dominant estate the lower half of the land in front of the house and now owned by Broughton was held in fee by his wife Olive Graves, and though the easterly line of the "land in front of the house" may have been uncertain until apparently defined by the iron stake, yet in any use made by him of the way he would have to pass over her land in going to and from his lot to Harding's Lane, and in order to establish the right now claimed to have been acquired as appurtenant to his land, it would have to be held, not only that this use of the estate belonging to his wife was open and uninterrupted, but also adverse to her title.

Putting to one side the obvious consideration that where husband and wife are separately seised of lands so situated that it is convenient to use and enjoy the two estates in common, an easement by such user does not become appurtenant to either, a more serious difficulty to overcome is the legal situation of Olive Graves at the time when it is said that a continuous use of her land by her husband had ripened into a prescriptive right annexed to his estate. She was a married woman, and being under the disability of coverture could not make a valid grant to her husband of such an easement. If legal capacity to make the grant is shown to be absent, the presumption falls. It has accordingly been held that the presumption of a lost grant of an easement acquired by adverse use during a period sufficient to bar an action for a recovery of land in a case of disseisin cannot arise where, at the time when the period begins to run, the estate to be subjected to the easement is owned by an infant, an insane person, or a married woman.

While the use may be open and uninterrupted, it cannot be said that those who are unable by reason of legal incapacity to assert their right to interrupt are to be held to have acquiesced



therein, or that as to them it is adverse. *Melvin v. Whiting*, 13 Pick. 184. *Lowell v. Daniels*, 2 Gray, 161, 169. *McGregor v. Wait*, 10 Gray, 72, 74. *Powell v. Bagg*, 8 Gray, 441. *Edson v. Munsell*, 10 Allen, 557, 568. *Brayden v. New York, New Haven, & Hartford Railroad*, 172 Mass. 225.

The ruling requested, that Eleazer T. Graves could not during coverture gain by prescription a right of way over land belonging to his wife, should have been given, and the instructions to the jury that he could acquire such way "under a claim of right in opposition to the owner of the premises where his own wife was the owner," were erroneous.

It therefore becomes necessary to sustain the exceptions in the first case.

But as no further error appears, the new trial will be confined to this issue alone, and the exceptions in the second case must be overruled.

*So ordered.*

*J. H. Sisk*, for Broughton.

*F. V. McCarthy*, for Graves.



CHARLES J. MCINTIRE, Judge of Probate, vs. MILLARD  
F. COTTRELL.

Middlesex. January 15, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Insolvency. Surety.*

Under Pub. Sts. c. 157, § 26, (R. L. c. 163, § 31,) a judgment against an administrator on a debt due from the estate, on which no demand for payment has been made upon the administrator, is not a debt "absolutely due" from a surety on the administrator's bond, and therefore a discharge in insolvency of the surety is no bar to an action against him brought on the administrator's bond by the judgment creditor, where the administrator has committed a breach of his bond by failing to administer the estate according to law, but where no demand for the payment of the judgment had been made on the administrator at the time of the first publication of the notice of the issuing of the warrant in insolvency.

CONTRACT against a surety on the bond of Fred M. Phillips, given as administrator of the estate of William M. Phillips, late

of Reading, in behalf of James M. Riley, holding a judgment against the administrator in an action brought on a judgment obtained against William M. Phillips in his lifetime. Writ dated December 19, 1902.

The defendant, in his answer as amended, alleged among other things, that since the date of the judgment against the administrator the defendant was petitioned into insolvency and had been discharged, and that the claim sued upon was a provable claim against the estate of the defendant and might have been proved against his estate by the plaintiff, and therefore was barred by the discharge of the defendant in insolvency.

In the Superior Court the case was submitted upon agreed facts, and judgment was ordered for the defendant. The plaintiff appealed.

By the agreed facts, it appeared, that the first publication of the warrant issued upon the petition in insolvency was on May 24, 1890; that on February 3, 1890, James M. Riley obtained his judgment against Fred M. Phillips, administrator; that on March 15, 1890, execution issued on this judgment; that on May 26, 1890, the execution was returned to court unsatisfied, and an alias was asked for and issued; and that by virtue of the alias execution on June 11, 1890, demand was made upon the administrator, Fred M. Phillips, by an officer properly qualified to make such demand, for the payment of the judgment, and the administrator failed to pay the judgment.

*C. C. Bucknam*, for the plaintiff.

*V. Goldthwaite*, for the defendant.

KNOWLTON, C. J. The plaintiff in interest is a creditor of the estate of William M. Phillips, deceased, and he sues the defendant as a surety upon the probate bond of the administrator. There has been a breach of the bond, and the only defence which we need to consider is the proof of a discharge in insolvency which was duly granted to the defendant by the Court of Insolvency in Norfolk County. The plaintiff's claim was not mentioned or referred to in the proceedings in insolvency, and the question is whether it was provable in those proceedings. If it was, it is barred by the discharge, and judgment should be entered for the defendant. If it was not, judgment should be entered for the plaintiff.

By the Pub. Sts. c. 157, § 26, which was in force when the proceedings in insolvency were commenced, claims provable in insolvency are defined. The definition, so far as it is material to the present case, includes "debts due and payable from the debtor at the time of the first publication of the notice of issuing the warrant," and "debts at that time absolutely due, although not payable." The provisions of the section in regard to certain contingent claims are not applicable to this one. The question is whether the plaintiff had a debt against the defendant, absolutely due at the time of the publication of the warrant. His only claim against him was as a surety upon the contract contained in the administrator's bond. At that time the plaintiff had recovered a judgment against the administrator for a debt due from the estate, but the administrator had not been asked to pay the judgment, although subsequently a demand was made upon him.

The liability of a surety upon such a bond does not constitute a debt until after there has been a breach of the bond. *Loring v. Kendall*, 1 Gray, 305, 314. *Sleeper v. Miller*, 7 Cush. 594. *Mann v. Houghton*, 7 Cush. 592. The stipulation in the bond which applies to this case is that the administrator shall administer according to law all the personal estate of the deceased which shall come to his possession, etc. This implies that he shall pay the debts if he has assets. But there is no violation of this stipulation as to any debt, until it has been established by a judgment, and the administrator has failed to pay the judgment on demand. Pub. Sts. c. 148, § 10. (R. L. c. 149, § 20.) Not until after this does the cause of action upon the bond arise. Even then the administrator and the sureties may defend successfully by showing that the assets have been used according to law. *Fuller v. Connelly*, 142 Mass. 227. The demand upon the administrator after judgment is not merely a preliminary, which stands instead of an authorization by the Probate Court to bring a suit upon a previously existing debt, but it is an essential to the creation of the debt itself upon the bond. Until the demand is made, it cannot be known that the administrator will not pay the judgment. The liability on the bond is contingent upon his failure to pay on demand. In *Heard v. Lodge*, 20 Pick. 58, 57, this was assumed by Chief Justice Shaw, before whom the case

was tried at *nisi prius*, and by the full court afterwards, in the opinion. See also to the same effect, *Newcomb v. Goss*, 1 Met. 333, 335; *Newcomb v. Williams*, 9 Met. 525, 536. We are of opinion, therefore, that there was no debt on the bond due absolutely from the defendant at the time of the first publication of the notice, and that therefore the claim was not provable against his estate.

Cases dealing with other subjects, but somewhat analogous in principle, are *French v. Morse*, 2 Gray, 111, *Thayer v. Daniels*, 110 Mass. 345, *McDermott v. Hall*, 177 Mass. 224, and *Murray v. Wood*, 144 Mass. 195.

*Judgment for the plaintiff.*

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FRANK JORDAN vs. ELIZABETH A. CARBERRY.

Norfolk. January 15, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Dog. License. Evidence.*

The issuing of a dog license by a town clerk in the name of a certain person as owner is not evidence that the licensee was the owner of the dog, if it is not shown by whom the license fee was paid, or at whose request the license was issued.

TORT for injuries from the bite of a dog of which the defendant was alleged to be the owner or keeper. Writ dated September 22, 1902.

At the trial in the Superior Court before *Schofield, J.*, the jury returned a verdict for the plaintiff, assessing double damages in the sum of \$250. The defendant alleged exceptions.

*J. P. Leahy & J. D. Drum*, for the defendant, submitted a brief.

*C. C. Barton, Jr.*, for the plaintiff.

KNOWLTON, C. J. This action was brought to recover damages for the bite of a dog of which the defendant was alleged to be the owner and keeper. The plaintiff introduced evidence tending to show that the defendant was the keeper of the dog,

and he did not attempt to prove that she was the owner of it. The defence was, that one Clifton B. Carberry was the owner and keeper, and to prove this a license issued by the town clerk to him as owner was offered in evidence. This was excluded, subject to the defendant's exception. No evidence was introduced to show by whom the license fee was paid, except that the fee for one year was paid by the defendant. There was no evidence to show at whose request the license was issued, or that Clifton B. Carberry had anything to do with the issuing of it. It was admitted that Clifton B. Carberry would testify, if present, that he was not the owner or keeper of the dog, and that he never paid a license fee for the dog and knew nothing about the license fee.

This exception presents the only question before us. The issuing of a dog license has effect, as evidence of ownership in the licensee, only when knowledge is brought home to him in such a way as to connect him with it. The independent act of the town clerk, or the action of the clerk at the request of another party, is not evidence against the person named as licensee. The fact that one's name is on the voting list of a city or town is no evidence of his residence there, unless it is shown that it was put on the list with his knowledge and consent. *Sewall v. Sewall*, 122 Mass. 156, 162. The act of assessors in taxing property of a person as owner is no evidence of ownership unless he pays the tax, or is otherwise connected with the assessment. *Mead v. Bowborough*, 11 Cush. 862. *Commonwealth v. Heffron*, 102 Mass. 148, 152.

In the present case the act of the town clerk lacks all the elements necessary to give it effect as evidence against the licensee, or in favor of third persons. See *Burns v. Stuart*, 168 Mass. 19.

*Exceptions overruled.*

**ALBERT KEEFE vs. LEXINGTON AND BOSTON STREET  
RAILWAY COMPANY.**

Middlesex. January 18, 1904. — February 26, 1904.

Present: **KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.**

*Street Railway. Contract, What constitutes.*

Under St. 1898, c. 578, § 13, the board of aldermen of a city or the selectmen of a town, in granting a location to a street railway company, cannot impose a condition regulating and restricting the fares to be charged.

A street railway company by accepting a location granted by the board of aldermen of a city or the selectmen of a town, does not make a contract with the granting board or the municipality to fulfil a condition of location illegally imposed.

**CONTRACT**, against a street railway company, for a fare alleged to have been collected from the plaintiff illegally. Writ in the District Court of Central Middlesex dated October 9, 1902.

On appeal to the Superior Court *Gaskill, J.* found for the defendant *pro forma*. Judgment was entered for the defendant; and the plaintiff appealed.

*A. E. Willson*, for the plaintiff.

*W. H. Coolidge & C. A. Hight*, for the defendant.

**KNOWLTON, C. J.** The plaintiff seeks to recover five cents paid under protest for his fare, demanded by the conductor on one of the defendant's cars. The defendant corporation was organized under the laws of this Commonwealth, after the St. 1898, c. 578, went into effect. The selectmen of the town of Concord and the selectmen of the town of Bedford, in granting the defendant a location in their respective towns, prescribed conditions as to the fares that might be charged for the transportation of passengers within the limits of the town. The plaintiff contends that the fare charged and collected in his case was in violation of these conditions. The first and most important question before us is whether such a condition could be imposed legally by a board of selectmen in granting a location.

Under the St. 1898, c. 578, § 13, the board of aldermen of a city or the selectmen of a town, in granting a location to a street railway company, may prescribe the manner in which the "tracks

185	183
d188	182
188	183
f188	253
185	183
192	112

shall be laid, and the kind of rails, poles, wires and other appliances which shall be used, and they may also impose such other terms, conditions and obligations in addition to those applying to all street railways under the general provisions of law, as the public interest may in their judgment require." The question is whether a condition may be imposed regulating and restricting the fares to be charged. The statute contains other provisions in regard to fares. By the Pub. Sts. c. 113, § 43, which was in force when the defendant corporation was organized (R. L. c. 112, § 69) the directors of a street railway company "may establish the rates of fare on all passengers and property conveyed or transported in its cars, subject, however, to the limitations named in its charter, or hereinafter set forth." Section 44 provided for a revision and regulation of the fares by the railroad commissioners, and § 45 provided that nothing contained in the two preceding sections should authorize the company or the board to raise the rate of fare above the rate established by agreement, made as a condition of location or otherwise, between the company or its directors and the mayor and aldermen of a city or the selectmen of a town, except by a mutual arrangement with the parties. This section recognizes the validity of such agreements under the former statute. But this and the next preceding section were repealed by the St. 1898, c. 578, § 26, leaving the section as to the authority of the directors to stand with no limitations upon their right. A new section in regard to the revision of the fares by the railroad commissioners was enacted, which is St. 1898, c. 578, § 23. Under this last section, the "fares shall not, without the consent of the company, be reduced below the average rate of fare charged for similar service by other street railway companies which, in the judgment of the board of railroad commissioners, are operated under substantially similar conditions." This statute gives to the directors primarily the right to fix and regulate fares. It then makes their action subject to revision by the railroad commissioners, who are to act, according to the terms of the section, upon broad considerations of public policy. The conditions which may be imposed in granting a location are of a different character, and do not include those for which special provision is made in other parts of the statute. See *Newcomb v. Norfolk Western Street Railway*, 179 Mass. 449. With street

railways extending long distances and passing through numerous cities and towns, it would be unwise and inexpedient to permit each town to fix the fares within its boundaries, as a condition of granting a location. The purpose of the Legislature to prescribe broad and general provisions for the regulation of fares is further emphasized by the St. 1901, c. 180, (R. L. c. 112, § 73,) which puts street railways upon precisely the same ground as railroads, as to provisions relative to changes and regulations of their fares.

The acceptance by the defendant of the locations granted by these towns did not make valid these conditions as to fares which the towns could not legally impose, nor did it make a contract as to fares between the corporation and the selectmen, or the town. The defendant might, therefore, at least prescribe for its passengers the payment of any fare which was reasonable. It is not contended that the fare collected of the plaintiff was more than was reasonable, or more than the company was accustomed to collect from other passengers who were travelling as he was. Indeed, it is contended by the defendant that it has complied with the terms prescribed by these towns, according to a proper understanding of them, certainly according to its own understanding of them, and that the charge complained of by the plaintiff was for a through passenger, to whom these conditions were not intended to apply.

We need not consider this contention particularly, as we deem it unimportant. The plaintiff, in his brief, does not contend that he is entitled to recover, except upon the ground that the conditions imposed as to fares were binding upon the defendant.

*Judgment affirmed.*



EDWARD H. ELDRIDGE *vs.* COUNTY COMMISSIONERS  
OF NORFOLK.

Suffolk. January 18, 19, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Way. County Commissioners.*

A petition for the laying out of a private way under Pub. Sts. c. 189, §§ 19-28, over land situated entirely in one town, may be made to the county commissioners and is not required by § 25 of the same chapter to be made to the selectmen, that section being merely permissive.

Upon a petition under Pub. Sts. c. 189, §§ 19-28, (R. L. c. 195, §§ 17-25,) the county commissioners may lay out a private way, to connect with a quarry, over land of a railroad company acquired for railroad purposes outside the limits of its route under St. 1895, c. 856, (R. L. c. 111, §§ 92-96.)

PETITION, filed March 26, 1900, for a writ of certiorari to quash the proceedings of the county commissioners of Norfolk County in laying out a private way, to give access to a quarry, on the petition of one Neil McNeil, under Pub. Sts. c. 189, §§ 19-28.

The case came on to be heard before *Braley, J.*, who, at the request of the parties, reserved it for determination by the full court upon the following questions: "1. Did the county commissioners of Norfolk County have original or concurrent jurisdiction to lay out a private way under the petition of McNeil? 2. Did the commissioners have authority to lay out a private way under Pub. Sts. c. 189, over the land so located by the Old Colony Railroad Company as aforesaid?" The land referred to was situated entirely in the town of Braintree, and was purchased by the Old Colony Railroad Company for a gravel pit. If either question was answered in the negative, the writ was to issue. If both questions were answered in the affirmative, the petition was to be dismissed.

*F. T. Benner*, for the petitioner.

*T. W. Proctor*, for the respondents.

KNOWLTON, C. J. The respondents, acting officially under the Pub. Sts. c. 189, §§ 19-22, laid out a private way, on the application of one McNeil, to give access to his quarry. The

petitioner asks for a writ of certiorari to quash their proceedings, on the ground, first, that inasmuch as the premises are situated entirely in one town, the application should have been to the selectmen under § 25; and secondly, that, since the way passes for a considerable distance over land owned by the Old Colony Railroad Company and located by the corporation under the St. 1895, c. 356, the respondents had no jurisdiction to lay it out.

Section 20 of the chapter first mentioned provides that a party desiring to make such improvements "shall file a petition therefor with the county commissioners" etc., while § 25 says that when the premises mentioned in § 19 are situated entirely in one town or city, "the petition may be made to the selectmen or mayor and aldermen thereof," etc. The petitioner contends that in the last named section the word "may" means "must." If the different parts of the statute had all been originally enacted at one time, there would be considerable ground for the petitioner's contention. But the sections from nineteen to twenty-four of this chapter were first passed as the St. 1855, c. 104, and have subsequently appeared as Gen. Sts. c. 148, §§ 19-24; Pub. Sts. c. 189, §§ 19-24; R. L. c. 195, §§ 17-22. Under the original act jurisdiction was given to the county commissioners alone. By the St. 1857, c. 292, permission was given to commence proceedings before the selectmen or mayor and aldermen when the premises were situated entirely in one town or city, and this provision has since appeared without material change in the Gen. Sts. c. 148, §§ 25-28; Pub. Sts. c. 189, §§ 25-28, and R. L. c. 195, §§ 23-25. The terms of this additional act were plainly permissive and not mandatory, and they leave the original act with no limitation of the powers conferred by it. The subsequent provisions were not intended to change the existing legislation, and the application in the present case might be made to the county commissioners or to the selectmen, at the option of the applicant.

The next question is whether a way can be laid out under this statute over land of a railroad company outside of the location of the line of its road, five rods in width, but within a location for railroad purposes under St. 1895, c. 356 (R. L. c. 111, §§ 92-96).

It is a general rule that land acquired under the right of eminent domain for a public use cannot be appropriated to a different public use which is inconsistent with that to which it was first appropriated, unless the intention of the Legislature so to appropriate it is plainly expressed. *Old Colony Railroad v. Framingham Water Co.* 153 Mass. 561. *Boston & Albany Railroad v. Cambridge*, 166 Mass. 224. But where the new use is not necessarily inconsistent with the old one, authority to take for the new use may be inferred from slight indications of intention. *Boston v. Brookline*, 156 Mass. 172. *Old Colony Railroad v. Framingham Water Co.*, *ubi supra*. In *Boston v. Brookline* it was held that the town of Brookline, under the general laws, might lay out a way over land taken and held by the city of Boston for the line of its aqueduct. The doctrines stated in that case and the cases there cited fully cover the case at bar.

The law has long recognized the right of the public to lay out ways across railroads. Gen. Sts. c. 63, § 57. Pub. Sts. c. 112, § 125. R. L. c. 111, § 130. *Boston & Albany Railroad v. Boston*, 140 Mass. 87. Under all these statutes the county commissioners have been the tribunal to determine when and how this right of the public should be exercised. The reason for permitting its exercise over lands which are located by the company outside of the line of the railroad for incidental uses, and which are subject to taxation because these uses are not so strictly public as that of the railroad itself, are stronger than the reasons for permitting ways across railroads.

This statute authorizing such improvements has stood without limitation for nearly fifty years. It contains ample provisions for compensation for those whose property is damaged by proceedings under it. We are of opinion that it gives authority to lay out a way over land located for railroad purposes outside of the location of the railroad itself.

*Petition dismissed.*

EDWARD S. YEOMANS & another *vs.* FRANK HEATH  
& another.

Suffolk. January 21, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Wagering Contracts. Constitutional Law.*

The right given by St. 1890, c. 437, to recover money paid on wagering contracts lawfully could be and was restricted as to existing causes of action by St. 1901, c. 459. Following *Wilson v. Head*, 184 Mass. 515.

CONTRACT, under St. 1890, c. 437, for money alleged to have been paid on wagering contracts between April 15 and May 1, 1901,\* alleging, that the plaintiffs contracted with the defendants to buy and sell upon margin certain securities and commodities, having at the time of the contract no intention of performing the same by the actual receipt or delivery of the securities or commodities and the payment of the price, and that the defendants had reasonable cause to believe that no intention to actually perform the contract existed. Writ in the Municipal Court of the City of Boston dated January 9, 1902.

On appeal to the Superior Court the case was heard on an agreed statement of facts by *Holmes, J.*, without a jury. The agreed statement of facts disclosed no affirmative intention of the plaintiffs at the time of the contract that there should be no actual purchase or sale of securities. The judge found for the plaintiffs and assessed damages in the sum of \$1,256.15. Judgment was entered for the plaintiffs; and the defendants appealed.

*W. H. Irish*, for the plaintiffs.

*J. Cavanagh*, for the defendants.

KNOWLTON, C. J. The case as stated in the agreed statement of facts and in the plaintiffs' declaration is within the St. 1890, c. 437, but is not within the law as amended by St. 1901, c. 459. This amendment deprived the plaintiffs of the right of recovery which they previously had. The case is covered by the decision in *Wilson v. Head*, 184 Mass. 515.

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\* St. 1901, c. 459, took effect on June 5, 1901.

Assuming, as we must for the purpose of this decision, that the agreed statement of facts correctly presents the case, the entry should be,

*Judgment for the defendants.*

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GARDNER WATER COMPANY vs. INHABITANTS OF GARDNER.

Worcester. January 21, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Great Pond. Waterworks. Gardner.*

The Legislature has power to give to a private corporation the right to use and sell the waters of a great pond in supplying the inhabitants of a town with water.

The Gardner Water Company was granted by St. 1882, c. 145, the right to take the waters of Crystal Lake, a great pond, and by § 9 of that act the town of Gardner was given the right to purchase the corporate property and all the rights and privileges of the Gardner Water Company at a price to be fixed by commissioners if the corporation and the town were unable to agree. The town having exercised its option of purchase, commissioners appointed under that section, ruled, that the corporation was entitled to the fair value, at the time of the exercise of the option, of the right to use and sell the waters of Crystal Lake for the purpose of furnishing the inhabitants of the town with water. *Held*, that the ruling was correct.

PETITION, filed June 17, 1902, under St. 1882, c. 145, § 9, for the appointment of three commissioners to determine the price to be paid by the town of Gardner for the corporate property, rights and privileges of the Gardner Water Company.

On August 19, 1902, Hosea M. Knowlton, James F. Jackson and George W. Wiggin were appointed such commissioners. On January 27, 1903, after the death of Mr. Knowlton, Nathan Matthews Jr. was appointed in his stead. The commissioners filed their report on August 12, 1903.

The case came on to be heard before *Braley, J.*, who, at the request of the parties, reserved it on the pleadings, the report of the commissioners and the objections of each party thereto, for determination by the full court.

*E. C. Bumpus*, (*T. B. Dunn* & *J. B. Sullivan, Jr.* with him,) for the petitioner.

*J. A. Stiles*, (*W. P. Hall* with him,) for the respondent.

KNOWLTON, C. J. The questions before us arise on the report of commissioners appointed to determine and award the compensation to be paid by the town of Gardner for the corporate property, rights and privileges of the Gardner Water Company, acquired by purchase by vote of the town under the authority of the St. 1882, c. 145, § 9. This statute is the charter under which this corporation was duly organized, for the purpose of furnishing the inhabitants of Gardner with water. By § 2 of the statute, the corporation was authorized to "take, hold and convey into and through the town of Gardner, or any part thereof, the water, so far as may be necessary for the purpose, of any spring or springs, or of Crystal Lake, so called, within said town, and the waters which flow into and from the same, together with any water rights connected therewith," etc. Section 3 directs that it shall, "within sixty days after taking any land or water rights under the provisions of this act, file and cause to be recorded in the registry of deeds for the county of Worcester a description" thereof and the "title of the land and water rights so taken shall vest in said corporation." On July 24, 1882, it filed in the registry of deeds a taking of "the waters so far as may be necessary for the purposes hereinafter mentioned, of 'Crystal Lake' so called, a great pond . . . and the waters which flow into and from the same, together with any water rights connected therewith, . . . for the purpose of supplying the inhabitants of Gardner with pure water," etc. It then constructed waterworks, which were in operation when the town of Gardner, under § 9 of this statute, voted to purchase "the corporate property and all the rights and privileges of said Gardner Water Company," the price to be paid for which these commissioners were appointed to determine.

The commissioners, in that part of the report which deals with the water rights of the petitioner, ruled as follows: that the corporation "was entitled, whenever the town of Gardner should take advantage of the option of purchase granted to it by sect. 9, to the fair value at that time of the right to use and sell the waters of Crystal Lake (and any other waters that may have been acquired by the company under the provisions of sects. 2 and 3) for the purpose of furnishing the inhabitants of

the town of Gardner with water for the purposes enumerated in sect. 1; subject to the right of the State to regulate the rates charged by the company (but not to establish rates so low as to be obnoxious to the provisions of the State or Federal Constitutions), to authorize competition (either public or private) from water sources other than those held by the company, to revoke the company's right to use the public ways of Gardner for its pipes and hydrants (thus leaving the company with the right only to sell its waters wholesale to a distributing company or the town, or to distribute through pipes laid exclusively on private land), to revoke the company's charter, to dispose of any part of the waters of the lake not required for the supply of the inhabitants of Gardner, to control, lease, or sell the use of the lake for fishing, boating, ice cutting, and other purposes not interfering with its use for a water supply in Gardner, to control the operations of the company and its use of the water of the lake to the extent reasonably necessary to protect the purity of the water, and otherwise to exercise over the company the police power of the State within the limits set by the State and Federal Constitutions. . . .

"In adopting this basis of valuation, we assume that the Legislature contemplated that the town, in purchasing the property, rights and privileges of the company would act in its private or proprietary capacity as a business corporation, and that the price should be fixed as if the purchase authorized by sect. 9 was to be made by a private corporation.

"We include in the expression 'water rights' as used in this ruling all the rights, privileges and franchises obtained by the company under its charter to sell and distribute the waters of Crystal Lake in the town of Gardner, except the right to lay and maintain pipes, etc., in the public streets, the right to take property by eminent domain, and the other rights considered separately below in 7.

"In valuing the company's water sources as defined above, the control and rights of the State in or over the same as therein set forth are to be borne in mind, as also the probability or improbability that these powers will in fact be exercised."

The respondent town objects to this part of the report, and the ground of its objection is stated in a motion to recommit, in

part as follows: "That the sole source from which the company obtained water to supply the town of Gardner was a source that was *publici juris*; that the title which the State had in this lake and its waters was held in trust by the State for the public; that the public owned or was entitled to the entire beneficial use of the waters of the lake; that the power of the State was limited to regulating the public uses to which the lake might be put and in deciding between two inconsistent uses; that the provisions of St. 1882, c. 145, so far as these provisions have reference to Crystal Lake, did not operate to confer upon the company, (a) any proprietary rights whatsoever, (b) any rights in or to the lake or the waters thereof for which it was entitled to receive any sum of money whatever; that a grant by the State of rights in or to the lake or the waters thereof which entitled the company to a valuation on the basis set forth in the report would deprive the public of that beneficial use to which it is entitled; that the grant or authority contained in said St. 1882, c. 145, was conferred with an implied reservation of the public right, and that such implied reservation is inconsistent with any right on the part of the company to have the lake or its waters or any rights therein valued as a part of the corporate property or as one of its rights and privileges; that said ch. 145 was in effect a regulation and determination as to different and inconsistent rights and uses to which the company was entitled; that the provisions of said ch. 145 conferred upon the company (a) merely a loan of the waters, (b) a permission to perform the service of delivering the water to a part of the public entitled to it which the Legislature did not intend should be included in the valuation in case the town voted to purchase as authorized by sect. 9 of said ch. 145; that the rights, if any, in and to the waters of Crystal Lake, of whatsoever nature, passed to the town under the vote taken April 26, 1902, as provided in said sect. 9; that the said rights were and are public rights for which nothing can be recovered in money by the company from the town," etc.

By the statute, the price to be paid is the fair value of the corporate property and all the rights and privileges of the corporation, without the limitation in reference to rights under the franchise which has been imposed in some recent statutes pro-



viding for similar purchases. See St. 1894, c. 474, § 2; St. 1895, c. 451, § 16; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365. In the last part of § 9 the transaction is referred to as a purchase of "said franchise and property."

The respondent in its argument relies chiefly upon the fact that the water rights granted are to use the waters of a great pond. It is true that such ponds are held by the Commonwealth for the benefit of the public, and it is not to be presumed that the Legislature would attempt to make any disposition of their waters inconsistent with the interests of the public. In this case we have no nice question as to the power of the Legislature to grant such property to an individual solely for a private use, for the grant to the petitioner was for an important public use. Of the power of the Legislature to give to a private corporation, as well as to a city or town, water rights in a great pond, to be used in supplying inhabitants with water, there can be no doubt. This power has been exercised many times in Massachusetts. The rights and privileges of this corporation in the water, under the charter, are similar to the rights of a railroad company in the land taken for its roadbed. Such land can be taken and held only for a public use; but the corporation has a valuable right of property in it. While the primary object in taking and holding it is the public benefit, which alone justifies a taking without the consent of the owner, an incidental object is the hope of profit to be derived by the corporation from the use of it. In this respect the title of the present petitioner in the use of the water does not differ materially from the title to the roadbed of a railroad acquired under the right of eminent domain. The act of the Legislature in granting these water rights is simply a regulation of the public rights in a great pond. It makes subordinate all other public rights which are inconsistent with the exercise of this one. *West Roxbury v. Stoddard*, 7 Allen, 158. *Rockport v. Webster*, 174 Mass. 385. *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548. *Fay v. Salem & Danvers Aqueduct Co.* 111 Mass. 27. *Attorney General v. Revere Copper Co.* 152 Mass. 444. It allows the corporation to hold and exercise these rights as a trustee for the public, and at the same time permits it to obtain income in its private capacity

from the sale of the water. It makes no difference that there was no private ownership in the waters of the pond before the enactment of the statute. Land which is taken for a railroad under the right of eminent domain is not acquired and held by virtue of a transfer of the title of the former owner as private property, but by virtue of the public interest which it is taken to subserve. The valuable private interest which the railroad company afterwards has in it is incidental to the public use, but it is none the less a right of property, secured by the franchise.

That the right of the petitioner to use this water was a valuable right, is further shown by the fact that the petitioner was compelled to make compensation to riparian proprietors on the stream flowing out from the pond, whose property was damaged by the taking of the water. To say nothing of other expenses in the construction of the waterworks, all of which were incurred to render valuable these water rights, the payments to mill owners on the outlet stream were made directly for the water itself, to be used for an indefinitely long time in the future. The petitioner's franchise included the use of valuable water rights which should be paid for by the respondent town. See *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray, 339, 347; *Central Bridge v. Lowell*, 4 Gray, 474, 480.

We are of opinion that there was no error in this part of the report of the commissioners. *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482. *West Springfield v. West Springfield Aqueduct Co.* 167 Mass. 128. The respondent makes no objection to any other part of the report, but moves that the rest of it be confirmed.

The petitioner presented numerous objections to the action of the commissioners, and moved that their award be recommitted. In the argument, however, it waived these objections and its motion, if the court should determine that the objection of the respondent was not well founded. On the determination which we have made, there is no occasion to consider other questions.

The entry will therefore be

*Award accepted, and judgment for the petitioner on the award.*

HARRIS B. STEARNS & another, executors & trustees, vs.  
LESLIE L. BEMIS & others.

Suffolk. January 21, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Will, Waiver of provisions of. Widow.*

Under R. L. c. 135, § 16, the right of a widow to waive the provisions of the will of her deceased husband made in it for her, can be exercised only by filing an absolute waiver, and the filing of a writing, purporting to waive the provisions of the will for her in case a certain construction is given to another portion of the will and not otherwise, is of no effect.

BILL IN EQUITY, filed June 8, 1903, by the executors and trustees under the will of John W. Bemis, late of Boston, for instructions.

The case came on to be heard before *Morton, J.*, who, at the request of the parties, reserved it upon the bill and answers for determination by the full court, such decree to be entered as equity and justice might require.

*B. B. Jones & F. P. Cabot*, for the widow.

*W. H. White*, guardian *ad litem* of the minor children of the testator, *pro se*.

KNOWLTON, C. J. This is a bill brought by executors and trustees under the will of John W. Bemis, late of Boston, deceased, for instructions as to their duties. The testator left a large estate, most of which he gave to trustees for the benefit of his widow and minor children, with remainder over to other relatives in case his children should die leaving no issue surviving them.

The widow, within one year after the probate of the will, filed in the Probate Court a writing signed by her, in which she recited the death of the testator and the provisions of the will in her favor and in favor of her children, and then proceeded as follows: "Therefore, the said Leslie Lepington Bemis hereby, as stated in this writing as a whole, waives and declines to accept the provisions made in said will for her and claims such portion of the estate of the deceased as she would have taken if the de-

ceased had died intestate, that is, she claims such portion to the extent of ten thousand dollars absolutely and, in addition thereto, the income during her life of the excess of her share of such estate above ten thousand dollars, if, under the terms of said will and by reason of its provisions and operation and by reason of the laws of the Commonwealth, upon this waiver, declination and claim, her said two children forthwith become entitled to the net income of the remaining fund left in trust by the will, even though said Leslie is still living and unmarried.

"The said Leslie does not waive and decline the provisions made in said will for her, and does not claim such portion of the estate of the deceased as she would have taken had said deceased died intestate as hereinbefore set forth, but expressly accepts the provisions made in said will for her, if said will by its terms or by reason of its provisions and operation and by reason of the laws of the Commonwealth does not entitle her said two children or their guardian to the net income of said trust fund forthwith though the said Leslie is living and unmarried, she, the said Leslie, having made this waiver, declination and claim, or if said will by its terms or by reason of its provisions and operation and by reason of the laws of the Commonwealth postpones payment of such income to said children or their guardian until the death or remarriage of said Leslie, she, the said Leslie, having made this waiver, declination and claim." The plaintiffs are in doubt and ask the instructions of the court whether the construction of the will should be such as to give this writing effect as a waiver by the widow of the provisions for her benefit. The counsel for the widow in their brief say: "Furthermore, the question presented to the widow under the statutes and by the will, in view of the decisions of this court by divided opinions hereinafter discussed, was not free from difficulty. A widow should not unnecessarily be compelled to make an election absolute in form at her peril upon a question concerning which the members of this court may differ."

The R. L. c. 135, § 16, is in part as follows: "The surviving husband, except as provided in section thirty-six of chapter one hundred fifty-three, or the widow of a deceased person, at any time within one year after the probate of the will of such deceased, may file in the registry of probate a writing signed by

him or by her, waiving any provisions that may have been made in it for him or for her, or claiming such portion of the estate of the deceased as he or she would have taken if the deceased had died intestate, and he or she shall thereupon take the same portion of the property of the deceased, real and personal, that he or she would have taken if the deceased had died intestate," etc. Then follow certain exceptions which are not now material.

We meet at the outset the question whether such a waiver, to take effect, must be absolute, or whether it may be contingent upon the decision that may afterwards be made of a doubtful question of law. We deem it pretty plain that a person contemplating such a waiver must determine for himself, in view of the facts as they are and the law as it is, whether he will waive the provisions of the will or not, and make a statement in writing accordingly; otherwise great uncertainty might be introduced into the settlement of estates of deceased persons. Parties interested as heirs or devisees or legatees would be troubled with doubts created by the surviving husband or widow, in regard to their legal rights in reference to a condition whose existence was due to the filing of the writing. Embarrassments would arise, as in the present case, such that executors or trustees would not know how to perform their official duties without a decision and instructions from the court. It might happen that if executors or trustees did not find it necessary to bring a suit to determine the legal questions raised by the filing of the paper, other persons interested in the estate might be left for years without knowledge whether the writing filed was or was not a waiver of the provisions of the will, for there might be cases where the questions raised would concern the interests in remainder of those who would not, for a long time, be in a position to bring a suit to determine their rights. The surviving husband or widow is in as good a position to know the legal effect of a waiver as any one. If the law is plain in regard to the questions raised by a waiver he ought to determine whether to file an effectual waiver. If the law is doubtful he ought to resolve the doubt as well as possible for himself, and not to create a condition which gives rise to uncertainty, and then decline to act definitely until a suit has been brought by others and the doubt dispelled by a decision of the court.

The statute permits the filing of a waiver at any time within a year after the probate of the will. It contemplates a writing whose meaning is clear and whose effect is to waive the provisions of the will. It assumes that the executors will then know whether the estate is to be settled according to the provisions of the will or according to the law applicable when a waiver has been filed. Upon the contention of the widow in this case, a writing may be filed which will suspend the settlement of the estate, and leave everybody uncertain for a long time whether there is or is not a waiver.

The writing filed in the present case does not purport to be an absolute waiver. It is a claim of a right to file a writing which shall leave undetermined the question whether the widow will waive the provisions of the will until it shall be decided what the law applicable to this will would be if an absolute waiver were filed. The filing of this writing was, therefore, of no effect.

As there was no waiver of the provisions of the will, we understand that there are no further questions upon which the plaintiffs need the instructions of the court.

*Decree accordingly.*

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MAYOR AND ALDERMEN OF TAUNTON, petitioners.

Bristol. January 25, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Damages, Grade Crossing. Taunton.*

By St. 1901, c. 205, the East Taunton Street Railway Company was authorized to intervene in proceedings then pending for the abolition of certain grade crossings in Taunton, and it was provided that if the commissioners appointed in those proceedings should decide that the abolition of the grade crossing on Middleborough Avenue and Richmond Street was necessary, the street railway company should pay such part of the total cost of the abolition of the crossing on Middleborough Avenue as the commissioners should find to be just and equitable, and should prescribe in their report. The commissioners determined that it was just and equitable that the street railway company should pay twenty-five per cent of this cost, and so prescribed in their report. By order of the commissioners Middleborough Avenue was carried by a bridge over the tracks of the

Old Colony Railroad Company, the part of Richmond Street at the previous grade crossing was discontinued, and a new way was substituted for it which entered Middleborough Avenue at a point convenient for crossing the railroad on the bridge constructed on that avenue. The street railway company contended that for this reason only one half the cost of the bridge should be charged on account of Middleborough Avenue and that the other half should be charged on account of Richmond Street. *Held*, that the action of the commissioners was authorized directly by the statute, and that they had a right to treat all the cost of the bridge as belonging to Middleborough Avenue.

KNOWLTON, C. J. Petitions were pending in the Superior Court for the abolition of a large number of grade crossings in the city of Taunton, and among them those on Middleborough Avenue and Richmond Street. The East Taunton Street Railway had a location on Middleborough Avenue, and by the St. 1901, c. 205, it was authorized to intervene in the proceedings in court, and thereupon to construct and maintain for a time its railway across the track of the Old Colony Railroad Company at Chace's Crossing, at the same level therewith, subject to restrictions and regulations to be prescribed by the railroad commissioners. It was also provided that the proceedings under the petitions relative to the crossings on Middleborough Avenue and Richmond Street should be had independently of the proceedings as to the others, and that if the commissioners should decide that the abolition of this crossing was necessary, the street railway company should pay such part of the total actual cost of the abolition of the grade crossing on Middleborough Avenue as they should find to be just and equitable, and should prescribe in their report. The commissioners ordered the abolition of these crossings, and prescribed in detail how the change on Middleborough Avenue should be made. They determined that it was just and equitable that the street railway company should pay twenty-five per cent of this cost, and so prescribed in their report.

The grade crossing on Richmond Street was abolished by discontinuing that part of the street which crossed the railroad, and constructing a new way as a substitute for the other, which came into Middleborough Avenue at a point convenient for crossing the railroad on the bridge constructed over the railroad on Middleborough Avenue. The auditor appointed under the statute made his report, and the East Taunton Street Railway

Company filed exceptions thereto which were overruled by the Superior Court. The case is before us upon the appeal of the railway company from the decree overruling the exceptions and confirming the report. The exceptions are, in substance, to the auditor's including, as a part of the cost of the abolition of the grade crossings on Middleborough Avenue, the entire cost of the bridge and masonry for the overhead crossing, and of the grading for the approaches, the land damages, and other incidental expenses of effecting the change on that avenue. The contention of the railway company is that, inasmuch as no bridge was needed on Richmond Street because Richmond Street was changed so as to enter Middleborough Avenue at a point which brought the travel upon it across the railroad over the Middleborough Avenue bridge, only half of the cost of this bridge should be treated as chargeable on account of Middleborough Avenue, and that the other half should be charged on account of Richmond Street.

This subject is covered by the statute and the action of the commissioners. They were authorized to prescribe the manner of making the changes, and to apportion the cost. All the expenses included by the auditor were incurred in making the changes on Middleborough Avenue which the commissioners prescribed in detail. In apportioning the cost between the street railway company and the others, they treated all these changes as belonging to Middleborough Avenue, as they had a right to do, and they made their order as to the percentages to be paid on this basis. The auditor has followed exactly their order, made under the authority of the statute. The street railway company has no reason to complain because the expenses of the change on Richmond Street were small. This resulted from the fact that proper changes on Middleborough Avenue made it unnecessary to construct a bridge on Richmond Street.

*Decree affirmed.*

*F. A. Farnham*, for the Old Colony Railroad Company and the New York, New Haven, and Hartford Railroad Company.

*A. M. Alger*, for the East Taunton Street Railway Company.

No counsel appeared for the petitioners or for the Commonwealth.



GEORGE F. HUSSEY vs. EDWARD L. ARNOLD & others,  
trustees.

Suffolk. January 26, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Trust. Attachment.*

No action can be maintained against trustees, holding the property of an unincorporated association, on a contract made by them which by its terms is enforceable only against the property held in trust.

No lien enforceable at law or in equity can be acquired by an attachment of the property held by trustees for the benefit of an unincorporated association, in an action against the trustees personally.

KNOWLTON, C. J. Some of the defendants entered into an agreement establishing an association called "The Boston Associates," and appointing three trustees to conduct the business of the association, which was to be the investment, management and use of property in real estate, in shares, in trusts and corporations, in bonds secured by mortgage upon real estate and in other similar securities, with a view to obtain income and profit for the owners. These trustees were to hold the title to all the property that was paid in or acquired, and to manage it, subject to the provisions of the agreement, as they should see fit. Either of the trustees could be removed, and a successor could be appointed by three fourths in value of the shareholders, and if not removed, they could fill vacancies in their board caused by death or resignation or otherwise. The trust could be terminated by a writing signed by three fourths in value of the shareholders; but if not so terminated, it was to continue for the term of twenty years after the death of the last subscriber to the agreement. Shares of \$100 each, taken by the subscribers and represented by certificates, could be transferred, and the transferee would thereby acquire the rights, and be subject to all the obligations of the original owner. Each shareholder was to be liable for the amount subscribed by him, but he was not to be liable to any third person, nor for any amount in excess of his subscription.

This association became insolvent, and a suit in equity was brought, and receivers were appointed to wind up its affairs. William B. Emery and Heber E. Emery, copartners under the name of W. H. and S. L. Emery, furnished coal to the trustees for the use of the association, for which they were not paid, and more than four months before the commencement of the suit in equity they brought an action at law against the trustees in their individual names, describing them as "Trustees of the Boston Associates," and attached on the writ all their right, title and interest in and to any real estate in the county of Suffolk. At that time these trustees held in their name as trustees the title to certain real estate in Boston which was acquired and held for the associates under this agreement. The plaintiffs in the action at law were enjoined in the suit in equity from proceeding to enforce the collection of their claim against the real estate under their attachment. They subsequently brought a petition in the suit in equity for a dissolution of the injunction, or for a decree establishing a lien in their favor upon the real estate. From an order of the Superior Court, denying and dismissing their petition, they appealed to this court.

The agreement creating the trust has peculiar provisions. The object of it, apparently, was to obtain for the associates most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations. Article twelve of the agreement is as follows: "All contracts and engagements entered into by the trustees shall be in their names as trustees, and shall provide against any personal liability on the part of the trustees, and stipulate that no other property shall be answerable than the property in the hands of the trustees." We have already said that the subscribers were not to be liable to third persons, and it would seem, therefore, that the business of the trust was intended to be done in a way that would give no one dealing with it a right to bring an action at law against anybody, to enforce any contract or liability of the association.

The trustees held the legal title to all the property and they alone could make contracts. Ordinarily, in the absence of special limitations, trustees bind themselves personally by their

contracts with third persons. Actions at law upon such contracts must be brought against them, and judgments run against them personally. This is because the relations of the *cestuis que trust* to their contracts are only equitable, and do not subject them to proceedings in a court of common law, and the property held in trust is charged with equities which hold it aloof from the jurisdiction of a court of law to take it and apply it in payment of debts created by the trustees. Such debts, if proper charges upon the trust estate, can be paid from it under the authority of a court of equity.

Whether the trustees in this case, in dealing with the petitioners, provided against personal liability in accordance with the direction of the agreement, as they might do (see *Shoe & Leather National Bank v. Dix*, 123 Mass. 148), does not appear. If they did, these petitioners cannot maintain an action at law against anybody. As agents and trustees under the agreement they were not authorized to contract any debt which should charge the certificate holders. Of course, if an action at law cannot be maintained, there can be no effectual attachment in such a suit as the petitioners originally brought. If the trustees contracted in the usual way, without referring to anything which would limit the liability resulting from an ordinary contract, they are personally liable to these petitioners, and judgment can be obtained and enforced against them individually; but the trust property cannot be held under an attachment nor sold upon an execution for their personal debts. If, as we presume to be the fact, the trustees were also certificate holders having equitable interests in the property, these are not attachable in an action at law. They can be reached only through proceedings in equity. R. L. c. 159, § 3, cl. 7. *Geer v. Horton*, 159 Mass. 259. *Wemyss v. White*, 159 Mass. 484. On no ground, therefore, can it be held that the petitioners acquired a lien upon the real estate by their attempted attachment in the action at law. In the pending suit in equity they stand like other creditors. They already have proved their claim against the estate in the hands of the receivers, and they will obtain their share of the assets.

Our decision goes no further than to hold that, upon the facts shown, the petitioners have acquired no lien, legal or equitable,

which gives them precedence over other creditors in the settlement of this trust. We do not attempt to determine whether all the provisions of this agreement are enforceable in the courts, or whether there are such considerations of public policy involved in an attempt of this kind to do business without a legal liability of anybody for debts incurred by the trustees, as merit consideration by the Legislature.

*Order affirmed.*

*G. W. Anderson*, for William B. and Heber E. Emery.

*G. R. Pulsifer*, for himself and others, receivers of the property of the Boston Associates.

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EDWARD S. BRADFORD vs. ALBERT METCALF.

SAME vs. JOSEPH STONE.

185	205
188	179

Suffolk. January 28, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Flats. Mystic River. Tide Water.*

St. 1898, c. 384, extending the time within which the proprietors of the lands, wharves and flats lying between Johnson's wharf and Elm Street on Mystic River could complete the improvements authorized by special laws of the Commonwealth, gave those proprietors an extension of the right to fill their flats without making compensation for the displacement of tide water under Pub. Sts. c. 19, § 14.

TWO ACTIONS OF CONTRACT by the treasurer of the Commonwealth under Pub. Sts. c. 19, § 14, for compensation for tide water displaced by the defendants in filling portions of the flats respectively belonging to them, lying in front of the upland between Medford Street and the shore of Mystic River. Writs dated respectively December 6, 1901, and March 11, 1902.

In the Superior Court the cases were heard upon agreed facts, and judgment was entered for the defendant in each case. The plaintiff appealed.

*F. H. Nash*, Assistant Attorney General, for the plaintiff, submitted a brief.

*C. F. Jenney & S. Robinson*, for the defendants.

KNOWLTON, C. J. These two cases present the same questions and they may be considered together. Each of the defendants filled certain flats in the harbor near the channel of Mystic River, under a license from the harbor and land commissioners, issued in accordance with the provisions of Pub. Sta. c. 19, §§ 12, 13. The treasurer of the Commonwealth brought these suits to recover the money due for the displacement of tide water caused by the filling, and the agreed facts show that he is entitled to recover, unless the defendants had a right to fill the flats without payment, under certain special statutes which relate to the improvements to be made in the harbor by the Mystic River Corporation. The licenses were granted without prejudice to the rights of either of the parties.

The first of these statutes was the St. of 1852, c. 105, which incorporated the Mystic River Corporation, whose members were to be the city of Charlestown and such other proprietors of land and flats situated in Charlestown, bounding on the southerly side of Mystic River between Johnson's wharf and Chelsea bridge, as should vote to accept the act at a meeting called for that purpose. Among these corporators were the predecessors in title of the defendants. The statute gave the corporation the right to fill flats and make improvements within certain specified lines, upon the condition that the regulation and control of certain other designated flats belonging to individuals and corporations should be surrendered to the Commonwealth before any construction authorized by the act should be commenced. This act was duly accepted, and a code of by-laws was adopted, and officers were chosen in accordance with its provisions. A by-law provided that the value of the grant should be "estimated and fixed by the directors and the amount thereof distributed among the grantees according to their several interests in the same." By the St. 1855, c. 481, this statute was repealed, except that part of it which incorporated the company, and a new grant was made which gave authority to fill the same flats and others, with additional rights and upon additional and changed conditions. The act was not to take effect unless accepted by the corporation within ninety days, but it was duly accepted.

Previously to the year 1852 there had been attempts to obtain legislation which had not resulted satisfactorily, and in anticipa-

tion of the application for the grant contained in St. 1852, c. 105, parties interested, owners and representatives of estates bordering on Mystic River, entered into an agreement under seal, whereby they undertook to bind themselves in regard to the distribution and use of the benefits to be obtained by the act of incorporation, giving to the owners of a certain part of the shore the benefits of the grant opposite their respective estates, to be divided among them in proportion to their ownership of the shore. A similar arrangement was made in regard to the owners of estates on another part of the shore. The benefits upon another part were to be the property of all the owners who were parties to the contract, to be divided among them in proportion to the length of their respective estates upon the line of the river bank between Malden bridge and Chelsea bridge. It also was agreed that they should all waive all claims for damages, and that the required excavations opposite estates whose owners were to hold in severalty were to be made by the respective owners, and all others by the whole company.

It is plain that this contract did not bind the corporation afterwards created. It could not affect in any way the legal rights of the corporation, or of its members in their action as corporators in the exercise of rights given them by the statute. The corporation could not even ratify the agreement in terms, for at the time of the agreement there was no corporation in existence for which any one could assume to make such a contract. *Abbott v. Hapgood*, 150 Mass. 248. *In re Northumberland Avenue Hotel Co.* 38 Ch. D. 16. *Howard v. Patent Ivory Manuf. Co.* 38 Ch. D. 156. *In re Empress Engineering Co.* 16 Ch. D. 125. *Melhado v. Porto Alegre Railway*, L. R. 9 C. P. 503. But as to matters within the powers of the corporation under its charter, it could enter into a new contract of a similar character. After the passage of the St. 1855, c. 481, the directors employed an engineer to designate the lines of the corporate property, and appointed a committee to ascertain the interest of the different members of the corporation in it. The report of the committee showed that the preliminary agreement between the associates had been examined, estimates by an engineer had been made, and a valuation put upon the flats, and they had been divided among the different classes of owners according to

the agreement. The report was adopted, and all shore owners received certificates of stock in accordance with the original plan. "It thereby appears that the middle shore owners, [among whom were the defendants' predecessors in title] by reason of the terms of the agreement of January 16, 1852, having received the grant opposite their estates in severalty, received a less interest in the corporate property on account thereof." "From 1852 to the present time the middle and upper shore owners from time to time have filled, some to the outer line, and some to less extent, each his own flats, acting by virtue of said acts, and have held possession of said flats in accordance with the agreement of January, 1852, and said votes of said corporation."

The time allowed to the corporation to build their improvements was extended from time to time by the Legislature, until everything was done that pertained to that portion of the property which was not connected with the estates set off to individual stockholders in severalty. See Sts. 1859, c. 19; 1867, c. 150; 1878, c. 5; 1887, c. 278; 1889, c. 25; 1891, c. 240. By the St. 1887, c. 278, the Mystic River Corporation was authorized to transfer its property, rights, privileges and franchises, to the Boston and Lowell Railroad Company, subject to all the conditions, limitations and obligations which then pertained to the ownership of the Mystic River corporation, and the property has since been held by the Boston and Lowell Railroad Company and the Boston and Maine Railroad.

The effect of the attempt of the corporation to give the benefits of its grant on a part of the shore to individual members of the corporation, to be held in severalty, if considered by itself alone, is very questionable. It seems that the directors treated the preliminary agreement as binding upon the corporation, and its officers and members. Action in intended execution of the agreement as a contract binding on the corporation would be of no effect. No conveyances were made from the corporation to anybody at that time, and the only title of these defendants and others owning the shore near their lands, rests upon the action of the corporation in accepting the report of the committee, and treating them as owners in severalty of their land, and of a part of the benefits granted by the charter. Probably

it was in the power of the corporation to sell and convey parts of its property with the appurtenant rights, subject to the conditions imposed by its charter; although it hardly could relieve itself of the effect of these conditions and its obligations, upon its title to the remainder of the property. Its right to make such sales was recognized by the St. 1884, c. 183. The defendants and their predecessors in title having been in possession of this property, claiming it and its appurtenant rights and privileges, from 1855 to 1893, the Legislature, by the St. 1893, c. 334, § 1, made this provision: "The time heretofore allowed for the completion of the improvements by the proprietors of the lands, wharves and flats lying between Johnson's wharf and Elm Street on Mystic River, authorized by the special laws of this Commonwealth, is, with the rights and subject to the requirements of such laws, extended ten years from the passage hereof." This is an express recognition of the rights of these defendants and others, acquired by virtue of the Sts. 1852, c. 105, and 1855, c. 481, and the action of the corporation and the shore owners under them. It may be assumed in favor of the plaintiff, that if these defendants had no rights whatever, legal or equitable, in the privileges granted by these acts, this later statute did not create such rights. *Salters v. Tobias*, 3 Paige, 338. *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204. *Bingham v. Supervisors of Winona County*, 8 Minn. 441. As against the Commonwealth, after the passage of the St. 1867, c. 275, (R. L. c. 202, § 30,) a title by disseisin could not be acquired in property below high water mark. See *Nichols v. Boston*, 98 Mass. 39. But these rights had been granted by the Commonwealth to the Mystic River Corporation, had been attached to the lands, and had been held by the defendants and their predecessors as their own property under a claim of right for more than forty years without interference by the corporation. As against this corporation, property rights could be acquired by disseisin and adverse possession. Under these circumstances the Legislature might well treat the grant as in force against the Commonwealth, and treat the defendants as the rightful owners of the benefits as against the Mystic River Corporation. We are of opinion that the St. 1893, c. 334, was an extension of the right to fill the defendants' lands with-



out paying for the displacement of tide water, which was originally granted to the Mystic River Corporation, and that this extension, granted in terms to the defendants and others who were in possession, inured to their benefit in such a way as to leave them outside of the Pub. Sts. c. 19, § 14. Even though they had not a title to these rights which was technically perfect, the rights had long been treated as existing in connection with their ownership of their land, and, as against the corporation, they had a title by disseisin to the upland to which the rights were appurtenant. There were also strong equitable considerations in support of their claim of ownership. At least this last act of the Legislature should be treated as a release and a grant to them by implication of all rights which the Commonwealth might assert as to their filling these flats under authority of the earlier statutes, and subject to the requirements of those statutes.

*Judgments affirmed.*

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**EPHRAIM ALBERT vs. BOSTON ELEVATED RAILWAY  
COMPANY.**

Suffolk. January 28, 1904. — February 26, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Negligence, Liability to trespasser. Street Railway.*

In an action against a street railway company by a newsboy twelve years of age when injured, for personal injuries, it is no evidence of a wanton and reckless act on the part of a conductor of the defendant, that, while standing on the rear platform of an open electric car of which he was in charge, he made a motion and ordered the plaintiff, who in violation of a rule of the company had jumped upon the running board while the car was in motion, "to get out of here" or "get off", whereupon the plaintiff fell off or jumped off and was injured.

TORT, against a street railway company for personal injuries, by a newsboy twelve years of age when injured, from falling or being thrown from an open electric car of the defendant by reason of the alleged negligence of the defendant's agents or servants. Writ dated September 9, 1898.

In the Superior Court the case was tried before *Richardson, J.*,

who ordered a verdict for the defendant. The plaintiff alleged exceptions.

*E. R. Anderson*, (*R. Levi* with him,) for the plaintiff.

*P. H. Cooney*, for the defendant.

KNOWLTON, C. J. The plaintiff, a newsboy twelve years of age, jumped upon the running board of an ordinary open street car as it was passing through Congress Street near State Street in Boston, for the purpose of selling his papers. He testified that he was in the habit of jumping on and off such cars when they were in motion. The testimony showed that the car was going at about its usual rate of speed, which we suppose was not great in that busy part of the city. There was no evidence that the speed was increased or diminished after he attempted to get on until after the accident. As he was changing hands and trying to get out a paper to deliver to a man who sat near the middle of the car, he fell off, or intentionally jumped off and was injured. There was testimony that the conductor, who was standing on the rear platform, made a motion and said something which the plaintiff did not understand, but thought was, "Get out of here," or "Get off," and that the plaintiff, being frightened, jumped off. He was on the running board but a very short time. To use his expression, "It all happened in a jiffy."

The plaintiff was a trespasser. His only right on the defendant's cars to sell newspapers at any time was under a contract between the defendant and his employer, in which it was stipulated that "newsboys shall enter and leave the cars by the rear platform and while said cars are not in motion and not otherwise." To him as a trespasser the defendant owed no duty except to refrain from wilfully or recklessly and wantonly exposing him to injury. *Metcalfe v. Cunard Steamship Co.* 147 Mass. 66. *Heinlein v. Boston & Providence Railroad*, 147 Mass. 136. *Reardon v. Thompson*, 149 Mass. 267. In speaking to the plaintiff the conductor was only trying to enforce the rule which the plaintiff was violating. He was not near the plaintiff, who was in the middle of the car. He had no reason to expect that his command would cause the plaintiff serious injury. There was no evidence that he acted wantonly or recklessly in telling the plaintiff to get off. The case is fully cov-

ered by *Mugford v. Boston & Maine Railroad*, 178 Mass. 10, and by *Bjornquist v. Boston & Albany Railroad*, ante, 130. See also *Leonard v. Boston & Albany Railroad*, 170 Mass. 318; *Planz v. Boston & Albany Railroad*, 157 Mass. 377.

*Exceptions overruled.*

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JOHN McLAUGHLIN & others vs. CHARLES G. RICE.

Suffolk. November 13, 1903. — February 27, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Evidence, Extrinsic affecting writings. Husband and Wife. Joint Tenants and Tenants in Common. Deed.*

It may be shown by extrinsic evidence, that a man and woman, named as grantees in a deed, were husband and wife when the deed was executed, before 1885, and therefore took an estate by entireties.

A deed to husband and wife executed before the enactment of St. 1885, c. 237, conveys an estate by entireties, which passes to the survivor.

WRIT OF ENTRY, dated October 18, 1901, by the heirs at law of Robert McLaughlin, for one undivided half of a parcel of land in Boston.

At the trial in the Superior Court before *Mason*, C. J., without a jury, it appeared, that the tenant claimed the whole estate, through mesne conveyances, from Jane McLaughlin, widow of Robert. The demandants put in evidence a deed dated May 2, 1878, from Samuel T. Harris, conveying the whole of the premises to "Robert McLaughlin and Jane McLaughlin and their heirs and assigns forever," the deed containing no statement as to whether or not they were husband and wife. The demandants introduced evidence tending to prove that Robert McLaughlin entered into possession of the premises and continued in possession until June 20, 1879, when he died intestate and without issue, that at that time his father and mother were living in Ireland, and that they died in 1892, leaving the demandants their children and heirs at law. The demandants contended that they were entitled to recover one undivided half of the premises as heirs at law, through their parents, of their brother Robert.

The tenant offered evidence, tending to prove the marriage of Robert McLaughlin and Jane McLaughlin, and contended that Robert and Jane took as tenants by the entireties, and that Jane, who survived Robert, became seised of the whole premises. This evidence was admitted by the judge against the objection of the demandants.

The demandants asked the judge to rule: 1. That all evidence as to a marriage was incompetent and inadmissible. 2. That there is no sufficient evidence that Robert McLaughlin and Jane McLaughlin were husband and wife. 3. That under the deed of Harris to Robert McLaughlin and Jane McLaughlin they took as tenants in common.

The judge refused to make any of these rulings, but made the following findings of fact: 1. That Robert and Jane McLaughlin were husband and wife at the time of the deed from Samuel T. Harris to Robert and Jane, dated May 2, 1878. 2. That the intent and purpose of all the parties to that deed was that it should convey the premises described therein to Robert and Jane as husband and wife, but that the parties did not contemplate or have any intent what technical estate should be created thereby. 3. That Robert and Jane McLaughlin made no conveyance of the premises or any part thereof during their joint lives. 4. That Robert McLaughlin died on June 20, 1879. 5. That Jane McLaughlin died in November, 1899.

Upon these facts the judge ruled: 1. That Robert McLaughlin and Jane McLaughlin took an estate by the entireties. 2. That on the death of Robert McLaughlin, Jane McLaughlin, as survivor, became sole owner of the granted premises. He found for the tenant; and the demandants alleged exceptions.

*H. J. Dubois*, for the demandants.

*H. M. Davis*, for the tenant.

LATHROP, J. 1. The first exception in this case and the first request for instructions raise the question whether, when land is conveyed by deed to A. and B., evidence is admissible to show that the grantees are husband and wife. We have no doubt that such evidence is admissible. If it were not, then a deed from a husband directly to his wife, which did not describe her as such, would be a valid deed, which could not for a moment be contended. In *Morris v. McCarty*, 158 Mass. 11, a deed was

made to A. and B., the latter being described as the wife of A. It was held that as B. was not in fact the wife of A., the grantees did not take an estate by entireties. It is the fact and not the description or want of description which determines the question. The first exception must therefore be overruled, and the first request for instructions was properly refused.

2. The second request for instructions was not argued.

3. The third request for instructions was also properly refused. The deed being to a man and his wife, they took an estate by entireties, and not as tenants in common. The deed was executed in 1878, and as the law then stood the rights of the grantees, they being husband and wife, were the same as at common law. Gen. Sts. c. 89, §§ 13, 14. See also Pub. Sts. c. 126, §§ 5, 6. It was not until the St. of 1885, c. 237, § 1, that the law was changed. In construing all conveyances prior to that statute, it has been held that a conveyance to a husband and wife conveyed an estate by entireties. *Pray v. Stebbins*, 141 Mass. 219. *Donahue v. Hubbard*, 154 Mass. 537. *Morris v. McCarty*, 158 Mass. 11. *Phelps v. Simons*, 159 Mass. 415.

The ruling of the court below that as the wife survived her husband she was the sole owner of the granted premises, and the finding for the tenant, were therefore right.

*Exceptions overruled.*

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## FREDERICK N. LORD vs. INHABITANTS OF WAKEFIELD.

Middlesex. November 18, 1903. — February 27, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Negligence, Employers' liability. Municipal Corporations. Electric Light Company.*

In an action, under St. 1891, c. 370, § 16, against a town operating an electric light plant, for injuries due to the fall of a pole on which the plaintiff was at work under the direction of the defendant's superintendent, it appeared, that the plaintiff, although he had worked for the defendant for several years as a trimmer of arc lights and a general helper about the electrical works, was not an experienced lineman, and was ordered by the defendant's superintendent to go up the pole in question and cut the wires, that the plaintiff after cutting two wires, felt the pole

tremble, and said to the superintendent "Don't you think you had better guy this pole?", that the superintendent replied "The pole is all right; cut them down," and that the plaintiff cut the wires and the pole fell, causing the injuries. The pole had been set eleven years before and was rotten at the base, although the outside was apparently sound. There was nothing to show that the plaintiff knew that the life of a pole was limited or that this pole was an old one. *Held*, that the plaintiff did not necessarily assume the risk of the pole falling, that it was the duty of the superintendent to inspect the pole, and that the jury might find that the plaintiff, although apprehensive of danger if the pole was not guyed, was justified in yielding his judgment to that of his superior and obeying the command, and therefore that it was error to order a verdict for the defendant, and the case should have been submitted to the jury.

*Seem*, that an experienced lineman sent without a superintendent to remove wires from a particular pole has no right to assume that the pole is sound, and as a matter of precaution should inspect the pole for himself.

LATHROP, J. This is an action of tort, with a count at common law and several counts under the St. of 1887, c. 270, and the amendments thereof, for personal injury sustained by the plaintiff while in the employ of the defendant. At the trial in the Superior Court at the close of the plaintiff's evidence, a verdict was ordered for the defendant, and the case comes before us on the plaintiff's exceptions, with a full report of the evidence. The evidence is set forth at unnecessary length, and the facts in the case may be briefly stated. The defendant was a municipal corporation, engaged in the manufacture and distribution of electricity for lighting purposes, under the St. of 1891, c. 370. Under § 16 of this act it was liable for any injury or damage to persons or property, "happening or arising by reason of the maintenance or operation of the same, in the same manner and to the same extent as though the same were owned and operated by an individual or private corporation." See R. L. c. 84, § 28.

The plaintiff had been in the defendant's employ at two different periods for four years and nine months. During that time he had worked as a trimmer, by which we understand a trimmer of arc lights, and had also been a general helper about the electrical works. He had set poles, helped string wires, and had put transformers on poles.

On the day of the accident, June 18, 1901, some wires were to be cut to allow a church, which was to be moved, to pass between two poles. One Weare, the superintendent in charge of the wires and all outside work, was sent by the manager of the plant with the plaintiff and a fellow servant to attend to the

cutting of the wires. Weare went up the pole to look after some fire alarm wires which had fallen across the pole. Soon after, Weare ordered the plaintiff to go up the pole and cut the wires. This pole was about twenty-five feet high, and was set in 1890. In obedience to the order of Weare, the plaintiff went up the pole, and with one leg over the cross arm, and the other leg on a step of the pole, cut two of the wires. The plaintiff then felt the pole tremble, and saw the other wires sag. He then said to Weare, who was standing at the foot of the pole, "Don't you think you had better guy this pole?" Weare replied, "The pole is all right; cut them down." The plaintiff then cut the wires, the pole fell, and the plaintiff was injured. The pole had entirely rotted away below the ground, and, though the outside was apparently sound, the pole was rotten for some distance above the ground.

The defendant does not contend that the plaintiff was not in the exercise of due care, nor that there was not evidence of negligence on the part of the defendant; and no question is made of Weare being a superintendent. The contention is that the fall of the pole was one of the risks which the plaintiff assumed; and that the defendant owed him no duty to inspect the pole.

But the answer to this contention is that the plaintiff was acting under the direct and immediate control of the superintendent. The risk was not an obvious one, and the plaintiff might treat the language of the superintendent as an assurance from one who knew better than he did that he could work there in safety. *Mahoney v. Bay State Pink Granite Co.* 184 Mass. 287, and cases cited.

The defendant relies principally upon the cases of *McIsaac v. Northampton Electric Lighting Co.* 172 Mass. 89, and *Tanner v. New York, New Haven, & Hartford Railroad*, 180 Mass. 572. We are however of opinion that the case before us is distinguishable from each of these cases. In *McIsaac v. Northampton Electric Lighting Co.* the plaintiff was an experienced lineman, and was sent off alone to remove two wires from one pole to another. He attempted to do the work in his own way, and was injured by the fall of the pole, owing to its rottenness below the ground. The plaintiff in that case knew that the life of a pole was limited, and that any pole after a time would become unsafe. In

the case before us the plaintiff was not an experienced lineman. He was not sent off alone, but under the care and guidance of a superintendent, who was to give the orders, and whose orders he obeyed. There is nothing in the evidence to show that the plaintiff knew that the life of a pole was limited, or that the pole was an old one. It may be impracticable for an electric lighting company to have a long line of poles constantly inspected, so that an experienced workman, sent by himself to remove wires from a particular pole, has no right to assume that the pole is sound, and should, as a matter of precaution, inspect the pole for himself, there being no difficulty in ascertaining whether any particular pole is rotten or not; but, in a case like the present, we are of opinion that it was the duty of the superintendent to inspect the pole, as he must have known that when the wires were cut the pole would fall, unless the pole was sound, and its condition was readily ascertainable.

In *Tanner v. New York, New Haven, & Hartford Railroad*, 180 Mass. 572, the plaintiff was an experienced lineman, and was set to work with others, under a superintendent, to remove wires from a number of old poles to new ones. The plaintiff knew that the pole was an old one, and knew the tendency of poles which had been set for a long time to rot beneath the surface of the ground. After he had thrown off the wires, they fell across a wire guy which connected the pole with a fence. The plaintiff told the superintendent that the wires were crossed on the guy, and asked him what he should do about it. The superintendent told him to cut it, and the pole fell. The court in its opinion says: "His question to the overseer was not whether it would be safe for him to cut the guy, and it could not be found fairly that the order was intended to be an expression that it was safe to cut it, or that the plaintiff had a right to interpret the order as such an expression." The court further says: "It was not a case in which the act of setting the workman to do a particular thing in a particular place might be understood fairly by the workman to be an assertion that the place was safe." In the present case, as we have already said, the plaintiff was not an experienced lineman, and he was set to work to do a particular thing in a particular place, under the supervision of a superior who knew the fact that he was not an experienced lineman.



While the conversation shows that the plaintiff was apprehensive of danger if the pole was not guyed, yet we are of opinion that it was a case where the jury could find that he might well yield his judgment to that of his superior, and obey the command. *McKee v. Tourtellotte*, 167 Mass. 69, 71.

In this view of the case, it becomes unnecessary to consider the construction to be given to the provision of the St. of 1899, c. 337, § 1, which provides: "Every person or corporation, private or municipal, owning or operating a line of wires over or under streets or buildings in a town, shall use only strong and proper wires safely attached to strong and sufficient supports, and insulated at all points of attachment." The portion of the section quoted is in substance the same as the St. of 1890, c. 404, § 1, except that the earlier statute applied only to wires over streets in a city, while the later applies to wires over or under streets in a town. In *Illingsworth v. Boston Electric Light Co.* 161 Mass. 583, Chief Justice Field, in delivering the opinion of the court, left it undecided whether it was the intention of the St. of 1890, c. 404, to give a private person a cause of action for any violation of the first section of the statute, if, in consequence of such violation, he suffers damage in his person or property.\* No such question arises here, for the right of action is given by the St. of 1891, c. 870, § 16.

*Exceptions sustained.*

*S. K. Hamilton*, (*T. Eaton* with him,) for the plaintiff.

*J. Lowell & J. A. Lowell*, for the defendant.

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\* The same point was left undecided in *Barker v. Boston Electric Light Co.* 178 Mass. 503, 504, 510.

## BENJAMIN LANCY vs. CITY OF BOSTON.

Suffolk. November 19, 1903. — February 27, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Damages. Practice, Civil. Grade Crossing Acts.*

Where a statute limits the time within which a petition for damages must be brought, the court has no jurisdiction to entertain a petition brought after that time has expired.

If a petitioner for damages, under an act providing for the abolition of a grade crossing, has a ground for equitable relief, he has no right to have the petition in the original proceedings for the abolition of the grade crossing amended by inserting the substance of his petition in it. His proper course would be to file a petition as intervenor in the grade crossing proceedings.

The general rule of law is that where the Legislature authorizes the taking of land for a public use, and the taking is in accordance with the statute, a plain and adequate remedy for compensation provided by the statute is exclusive.

In a taking of land under an act providing for the abolition of a grade crossing, if the provisions of the statute are complied with by proceedings in court, it is immaterial whether the landowner had in fact any notice or knowledge that his land was taken.

LATHROP, J. This is a petition to the Superior Court, filed June 25, 1900, for a jury to assess damages for the taking of a parcel of the petitioner's land for a highway, by the commissioners appointed under the St. of 1897, c. 519, to consider the abolition of the grade crossing of Dorchester Avenue and the railroad of the Old Colony Railroad Company. The decision of the commissioners was confirmed by that court on June 23, 1898.

The taking by the commissioners was authorized by § 3 of the act, and, by § 4, all damages suffered by any persons in their property by reason of anything done under the act might be recovered as provided in the St. of 1890, c. 428. Section 5 of this act provides that a petition to the Superior Court for the assessment of damages shall be "brought within one year after the day of the date of the decree of the court confirming the decision of said commission."

The respondent filed a general denial, and subsequently moved to have the petition dismissed for the reason that it was not filed in time; and the petitioner moved to amend the petition

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into a bill in equity, incorporating it as a paragraph in the original petition for the abolition of the grade crossing, by striking out the prayer for a jury, and substituting therefor a prayer that the damages be assessed by the court sitting in equity, and an allegation that the taking was without the knowledge of the petitioner, or notice to him; that he first learned of the taking about June 20, 1900; that the land was erroneously taken as the land of the Old Colony Railroad Company, and not as the land of the petitioner; and that if it had been taken as his he would have had an award in his favor and would have been notified of the taking.

The judge ruled that the petition could not be maintained, granted the motion to dismiss, and ordered judgment for the respondent. The judge further ruled that if the petition could be turned into a bill in equity it could not be maintained for the assessment of damages, and reported the case for the determination of this court. If either of the rulings was wrong, judgment was to be entered for the petitioner for \$200, and costs.

The first contention of the petitioner is that the petition can be maintained on the ground that the street was laid out, not as a part of the abolition of Dorchester Avenue grade crossing, but as a separate municipal improvement; and to this point he cites *Farwell v. Boston*, 180 Mass. 433, 438. While there is broad and general language in the opinion, the only points decided were that § 4 of the St. of 1897, c. 519, was intended "to ensure compensation for all damages, but not to change the rule of damages," and that a petitioner, whose access to a railroad was taken away by the removal of the railroad, and whose land was not taken in this connection, could not recover damages for the injury to his business. There is nothing in that case which bears upon the contention of the petitioner here as to the time in which the petition must be filed.

Where a statute limits the time in which a petition for damages must be brought, the court has no jurisdiction to entertain a petition brought after that time has expired. *Custy v. Lowell*, 117 Mass. 78. *Cambridge v. County Commissioners*, 117 Mass. 79. *Gately v. Old Colony Railroad*, 171 Mass. 494, a decision under the St. of 1890, c. 428, § 5. See also *McGrath v. Water-*

town, 181 Mass. 880. The petition therefore was rightly dismissed.

It is not contended that the case falls within the provisions of the St. of 1900, c. 84, and it is clear that it does not, for that statute is limited to persons injured by a change of grade of streets in connection with the abolition of the grade crossing of Dorchester Avenue and the Old Colony Railroad.

The remaining question is as to the right of the petitioner to change the petition into a bill in equity by inserting it with some changes into the petition in the original proceedings to abolish the grade crossing. It is clear that if the petitioner has any right to equitable relief he has no right to have the petition in the original proceedings amended, and his proper course would be to file a petition in that case as an intervenor. *Middleborough v. New York, New Haven, & Hartford Railroad*, 179 Mass. 520, 524.

But we are of opinion that he is not entitled to relief in equity. It is true that such relief was granted in the case last cited, but that was on the ground that the town which sought to recover damages for land taken within its borders, could not avail itself of the relief afforded by § 5 of the St. of 1890, c. 428, because it could not sue itself.

The general rule of law is that where the Legislature authorizes the taking of land for a public use, and the taking is in accordance with the statute, and a plain and adequate remedy is provided for compensation, the remedy provided by statute is exclusive. *Perry v. Worcester*, 6 Gray, 544, 546. *Hull v. Westfield*, 133 Mass. 483, 484. *Boston Belting Co. v. Boston*, 149 Mass. 44. *Titus v. Boston*, 149 Mass. 164, 166. *Bainard v. Newton*, 154 Mass. 255, where relief in equity was denied.

In *Gately v. Old Colony Railroad*, 171 Mass. 494, it was contended that the St. of 1890, c. 428, § 5, was unconstitutional because it did not provide for notice to the owner whose land was taken; but it was pointed out in the opinion that the entire proceeding of taking the land was by a suit in court, and it was held that no further notice was required than that provided for in the statute. See also *Appleton v. Newton*, 178 Mass. 276, where this subject is discussed at length. The fact therefore that the petitioner had not in fact any notice or knowledge that

his land was taken, is immaterial, if the provisions of the statute were complied with, and there is nothing to show that they were not complied with.

*Judgment for the respondent affirmed.*

*W. O. Childs*, for the petitioner.

*S. M. Child*, for the respondent.

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JOHN H. GERRISH *vs.* MICHAEL C. HAYES.

Suffolk. November 20, 1903. — February 27, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Practice, Civil, Exceptions.*

A defendant excepted to a refusal of the presiding judge to rule that the declaration set forth no cause of action. Thereafter the plaintiff was allowed to amend his declaration, and did so. The defendant asked for no ruling on the amended declaration and stated in his opening to the jury that his only defence was on a question of fact. On this question the jury found for the plaintiff, and the defendant alleged exceptions. *Held*, that the defence that the declaration 'as amended set forth no cause of action was not open to the defendant, and that his exceptions based on this ground were frivolous.

CONTRACT, upon a guaranty in writing of a promissory note. Writ in the Municipal Court of the City of Boston dated November 26, 1901.

The answer contained a demurrer, and set up the defendant's discharge in bankruptcy. On appeal to the Superior Court the case was tried before *Pierce, J.* At the beginning of the trial, the defendant asked the judge to rule that the declaration did not set forth any cause of action. The judge refused so to rule, and the defendant excepted. To an inquiry by the judge, in what respect the declaration was deemed insufficient, the defendant's counsel replied that it did not seem to him to set forth any cause of action, and at no time during the trial was any specific defect in the declaration called to the attention of the judge by the defendant.

The plaintiff was allowed to amend his declaration, and did so. The defendant asked for no ruling on the declaration as

amended, and in his opening to the jury said that the only defence was the discharge in bankruptcy, and offered evidence, which was controverted by the plaintiff, that the plaintiff had notice of the bankruptcy in season to have proved his claim. The jury were given appropriate instructions, to which no objection was made, and found for the plaintiff. The defendant alleged exceptions.

*M. C. Hayes, pro se.*

*W. F. Prime & W. C. Cogswell, for the plaintiff.*

LATHROP, J. While the defendant excepted to the refusal of the judge to rule that the declaration did not set forth any cause of action, he asked for no ruling on the declaration as amended, and in his opening to the jury stated that a question of fact was his only defence. On this question the jury found in favor of the plaintiff. In his brief the defendant contends that the declaration as amended sets forth no cause of action. We are of opinion that this defence is not open to him. The exceptions are frivolous, and are overruled, with double costs.

*So ordered.*

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### FANNY B. CLARK vs. GEORGE LEE.

Norfolk. December 8, 1903. — February 27, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Equity Pleading and Practice. Equitable Restrictions. Words, "Building", "Projection."*

In a bill in equity to enforce an equitable restriction, a copy of the deed containing the restriction should be annexed to the bill.

A brick wall, extending from a house, built on part of a retaining wall as a screen, is not a building or "any part of or projection" from the house within the meaning of an equitable restriction using those terms.

BILL IN EQUITY, filed April 28, and amended June 15, 1903, to enforce an equitable restriction imposed by a certain deed on the defendant's house lot on Walnut Street in Brookline.

The case came on to be heard before *Morton, J.*, and, at the request of the parties, was reserved upon the bill, answer, facts

admitted, photographs and plans for determination by the full court, such disposition to be made of it as to the full court should seem meet.

The plaintiff and the defendant were the owners of adjoining lots on Walnut Street in Brookline, both originally owned by the defendant. The substance of the restriction is stated in the opinion. The alleged violation of the restriction was the erection by the defendant of a brick wall, one end of which extended to the boundary between the lots of the plaintiff and the defendant. The facts admitted were as follows:

"The plaintiff's and the defendant's lots before they were built upon sloped gradually from the street toward the rear portion of the lots, being about four feet lower in the rear than at Walnut Street. The plaintiff's house was built to within twenty feet of Walnut Street, and from the southerly line of the plaintiff's house a retaining wall extended at right angles to the dividing line between the plaintiff's and defendant's lots of a height sufficient to make the space between this retaining wall and Walnut Street, when filled in, level with the street. This retaining wall is fifty-seven feet from Walnut Street. The plaintiff's house, retaining wall and filling, were all in place at the time the property was conveyed by the defendant to the plaintiff's grantor, and the defendant's premises had not been in any way improved or changed.

"The neighborhood is one of good dwelling houses costing from \$10,000 upwards. The retaining wall running between the defendant's house and the plaintiff's lot, and along the southerly line of the plaintiff's lot, was put there to keep the grade up so as to give a proper entrance to the front door of the defendant's house, and the grade of that part of the defendant's lot, between the retaining wall and the street, as filled, is the same as the grade of that part of the plaintiff's lot between the plaintiff's retaining wall and the street, as filled. The brick wall superimposed upon a part of the defendant's retaining wall was erected to screen off the back of the defendant's premises from the view of people entering the place, and the piers and screens superimposed upon the other part of the retaining wall were erected to screen off the back of the plaintiff's premises from the view of people entering the defendant's place, and as

a matter of ornament, to form a little court or enclosure about the entrance to the defendant's house. In the plans made by the defendant's architect, the retaining wall, brick wall and piers, appeared substantially as erected, and in planning the house and grounds it was intended by the defendant to bring the land in front of the wall up to the level of Walnut Street, and to construct the retaining wall and superimpose thereon the brick walls and brick piers."

*R. F. Sturgis*, for the plaintiff.

*W. H. White*, for the defendant.

LATHROP, J. In the defendant's deed to the plaintiff's grantor, it was provided that, on the defendant's remaining land, lying southerly of the land conveyed, no dwelling or other house or building or any part thereof or projection therefrom should be built thereon within sixty-five feet of the easterly line of Walnut Street, or within fifteen feet of the southerly line of the premises conveyed; and that not more than one house and no house except a single detached dwelling house should be erected thereon. We regret that we have not been furnished with a copy of the deed, which should have been annexed to the bill, so that the exact language could be given; but we have stated the substance of the language used, as we gather it from the bill and answer.

It is admitted that the defendant has built his house in conformity with the language of the deed; and the only complaint is that he has erected certain walls on his land, which it is said are in conflict with his covenant not to build, or are contrary to the restriction imposed by him on his remaining land.

We are of opinion that the covenant or restriction applies only to the house to be built upon the land, and not to a wall, even if the wall extends from the house into the restricted space. Such a wall as was here built extending from the house cannot be deemed to be "any part of, or projection" from, the house. These words evidently refer to bay windows or porches, or things of that nature.

That a wall cannot be held to come within the term "building" is in our opinion conclusively settled by the cases in this Commonwealth. Thus in *Truesdell v. Gay*, 13 Gray, 311, it was said by Mr. Justice Bigelow: "The word 'building' cannot



be held to include every species of erection on land, such as fences, gates or other like structures. Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament or use, constituting a fabric or edifice, such as a house, a store, a church, a shed." See also *Nowell v. Boston Academy of Notre Dame*, 130 Mass. 209, which seems to us conclusive of this case.

*Bill dismissed.*



J. REGESTER'S SONS COMPANY *vs.* WILLIAM G. REED  
& others.

WESLEY C. KOLLER *vs.* THOMAS S. MOFFATT & others.

Suffolk. December 10, 1903. — February 27, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Equity Pleading and Practice. Bills and Notes. Evidence, Burden of proof.*

On an appeal in equity this court will not reverse findings of fact made by the court below unless clearly erroneous.

Where it appears that a promissory note was put into circulation fraudulently, the burden of proof is upon one claiming title to the note to show that he gave a valuable consideration for it without knowledge of the fraud.

TWO BILLS IN EQUITY, filed September 2 and 5, 1902, to obtain possession of certain promissory notes alleged to have been withheld and secreted wrongfully by the defendants.

In the Superior Court the cases were heard by *Hardy, J.*, who made a decree for the plaintiff in each case. The defendants appealed.

*C. F. Eldredge & W. A. Buie*, for the defendants Clark and Warner.

*H. S. MacPherson*, for J. Regester's Sons Company.

*G. F. Ordway*, for Koller.

LATHROP, J. Each of these cases comes before us on an appeal from a decree of a judge of the Superior Court, sitting in equity, with a full report of the evidence taken before him by a commissioner appointed under a rule of court. The judge, at the

185 228  
190 345  
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request of the defendants, in each case made a finding of facts, and this finding is a part of the record.

The familiar rule applies that in such an appeal this court will not reverse the finding of the court below unless it clearly appears to be erroneous. *Dickinson v. Todd*, 172 Mass. 183, and cases cited. We have examined the voluminous report of the evidence and are of opinion that the findings of the judge were fully warranted. It would serve no useful purpose to review the evidence.

The defendants contend that the findings must be supported by the evidence, including the inferences to be drawn from the written and spoken words, and the conduct of the parties and their witnesses, and that mere suspicion is not enough. So far we agree; but it appears from the evidence that the notes were fraudulently put into circulation, and the burden of proof was upon the defendants to show that they gave a valuable consideration for the same, and took the notes without knowledge of the plaintiffs' rights. *Merchants' National Bank of Lowell v. Haverhill Iron Works*, 159 Mass. 158. *Savage v. Goldsmith*, 181 Mass. 420. The defendants failed to satisfy the judge who heard the cases that they had sustained this burden, and they have failed to satisfy us.

The order therefore in each case must be

*Decree affirmed.*

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JOHN D. COLBERT vs. MICHAEL J. MOORE & others.

Middlesex. December 18, 1903. — February 27, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Equity Pleading and Practice.*

Upon an appeal from a decree of a judge sitting in equity upon questions of fact arising on oral testimony heard by him, his decision will not be reversed unless it is plainly wrong. In this case the judge's findings of fact were supported by the evidence.

LATHROP, J. This is a bill in equity against Michael J. Moore, Grace E. Stults and Mabel M. Stults, to have a mortgage

185	227
192	561
185	227
193	143
193	201

deed and note, purporting to be signed by the plaintiff, declared null and void, on the ground that the signatures thereto were forgeries. The judge of the Superior Court who heard the case entered a decree which ordered the bill to be taken for confessed against Moore, who did not appear, and recited that the mortgage and note were executed and given by the petitioner to Michael J. Moore, without fraud or deceit on the part of Moore, and that the other defendants were *bona fide* holders of the mortgage, and ordered that the bill be dismissed as against them with a single bill of costs. The bill comes before us on the plaintiff's appeal, with a full report of the evidence, taken in open court at the hearing.

The appeal brings before the court questions of fact as well as questions of law, and it is the duty of the court to examine the evidence, and to decide the case according to its judgment, giving due weight to the finding of the judge. *Goodell v. Goodell*, 173 Mass. 140, 146. It is however true that upon an appeal from a decree of a judge in equity upon questions of fact, arising on oral testimony heard before him, his decision will not be reversed unless it is plainly wrong. *Dickinson v. Todd*, 172 Mass. 183, and cases cited.

In the case before us there was evidence on which the judge properly could find for the defendants other than Moore. They were the assignees of the mortgage, and there can be no doubt, on the evidence, that they were *bona fide* holders of the mortgage and note, for a valuable consideration. The only question upon which any doubt can be raised is whether the signatures of the plaintiff to the mortgage and note were forged. On his direct examination, the plaintiff testified that each signature was forged. On cross-examination he admitted with reluctance that his signature to the mortgage was genuine, and the only reason he gave for disputing the genuineness of the signature to the note was that it was blurred. This seems to us a very insufficient reason. The evidence showed that at the time the mortgage was given he was the debtor of Moore, and he refused to produce his books of accounts and papers, although it appeared that he kept his accounts in a methodical manner. The mortgage and note were produced at the trial in the Superior Court and at the argument before us. It seemed to us that there was no difference in the two signatures.

On the whole case we are of opinion that the decree should be affirmed.

*So ordered.*

*F. A. Campbell*, for the plaintiff.

*J. R. Murphy*, for the defendants, Grace E. and Mabel M. Stults.

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HANNAH E. SMITH vs. HENRY WENZ.

Suffolk. January 12, 1904. — February 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Landlord and Tenant. Contract.*

A lease of a portion of a building to a manufacturer of confectionery included the use of steam for heating and for power, providing for an additional payment at a certain rate if more than three horse power was furnished. It further was provided, that the lessee should have the "privilege to connect a pipe to the steam supply pipe to draw steam for use in the confectionery or in his business, when steam is in the supply pipe, provided same can be done without extra expense to lessor, or those representing her, either for making changes or for supplying steam." At the request of the lessee the engineer of the lessor connected the cooking apparatus of the lessee with the pipe carrying the live steam from the boiler to the engine, the lessee understanding that this was the connection to which he was entitled under the provision of the lease. For more than four years monthly rent bills were presented and paid with no demand of payment for cooking steam. Thereafter upon a close examination of the steam pipes, the lessor discovered that the steam supplied for cooking had caused extra expense, and brought an action for compensation for the steam furnished for cooking during the period of the lease. It was found as a fact that the plaintiff by the exercise of reasonable care could have known the facts about the connection and the use. *Held*, that the meaning of the clause of the lease was that the defendant should be entitled to have furnished for cooking purposes steam, which in relation to the entire plant and the defendant's business, should be of no considerable cost to the plaintiff, that this was a matter peculiarly within the knowledge of the plaintiff, that the defendant was entitled to notice that a charge was to be made for the steam, and that the plaintiff could not recover for steam furnished for cooking purposes before such notice was given.

CONTRACT by the owner of a building on Harcourt Street in Boston, used for manufacturing purposes, for compensation for steam power, cooking steam and water alleged to have been furnished to the defendant, a manufacturer of confectionery. Writ dated February 7, 1903.

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192	554

In the Superior Court the case was tried before *Mason*, C. J., without a jury. He made the findings and rulings stated in the opinion, and ruled that the plaintiff could not recover for cooking steam furnished and used. The judge found for the plaintiff in the sum of \$1,322.69, and at the request of the plaintiff reported the case for determination by this court.

If the ruling that the plaintiff was not entitled to recover anything for cooking steam was right, judgment was to be entered for the plaintiff on the finding of the judge for \$1,322.69, and interest thereon from July 9, 1903. If this ruling was wrong, and the plaintiff was entitled to recover for the cooking steam furnished, judgment was to be entered for the plaintiff for the additional sum of \$1,927 and interest thereon from July 9, 1903.

*G. W. Anderson*, for the plaintiff.

*S. C. Bennett*, for the defendant.

HAMMOND, J. This is an action of contract to recover for steam power, cooking steam and water alleged by the plaintiff to have been supplied by her to the defendant. By the terms of the lease the defendant, a manufacturer of confectionery, was to hold as tenant certain portions of a building owned by the plaintiff "including steam necessary to heat the existing heating apparatus during business hours in cold weather, . . . together with three horse power to be furnished by the lessor to a pulley on the premises during ordinary business hours." The lessee was "to put up and maintain his own shafting, belting and machinery"; and it was further provided that "if the lessor shall furnish and the lessee shall use power in addition to said three horse power then the lessee" agrees to pay for such additional power "so used at the rate of \$95 per year, per horse power in monthly proportions on the days and as hereinafter provided for rent." It was still further provided that the lessee was to have the "privilege to connect a pipe to the steam supply pipe to draw steam for use in the confectionery or in his business, when steam is in the supply pipe, provided same can be done without extra expense to lessor, or those representing her either for making changes or for supplying steam." The lessee was to pay rent at the rate of \$2,840 a year, in equal monthly payments of \$236.67 on the fifteenth day of every month, and

also an additional sum as above stated for extra horse power. The lease contained certain other provisions, but they do not seem to have any bearing on the question before us.

It therefore appears that ordinarily steam was used in this building both for heating and for power, and that, to the extent named in the lease, the lessee was entitled to use it for both purposes. It further appears that in the business of manufacturing confectionery steam could be used for "cooking," and consequently there was given to the defendant the right under certain conditions to draw steam from the supply pipe for that purpose. For this no extra compensation was to be paid. It was one of the rights the payment for which formed a part of the sum named as rent.

The lease was dated May 15, 1898, and on that day the defendant began his occupation of the tenement. Shortly after this, at the request of the defendant, the system of pipes running to his various heating kettles was connected with the pipe carrying the live steam from the boiler to the engine. The only question before us is whether the plaintiff is entitled to recover anything for this cooking steam.

The connection was made at the request of the defendant, and, as he supposed, in order that he might enjoy the privilege given him by the lease to use cooking steam. Neither in making the request nor in using the steam did he suppose or have any reason to suppose that he was using any cooking steam except that furnished under the terms of the lease. Nor does it appear that the plaintiff's engineer who made the connection supposed that he was doing anything not provided for by the lease. Whether the term "steam supply pipe" means on the one hand the pipe carrying the waste steam, after the same had been used by the engine, through the building where it was used for heating purposes, as contended by the plaintiff, or, on the other, the pipe carrying "live steam" from the boiler to the engine, as contended by the defendant, it is certain that the connection was such as the defendant thought he was entitled to have, and that it was made by the engineer who, as to all matters connected with the steam and mechanical appliances, had general charge as the agent of the plaintiff. It further appears that the rent bills were presented monthly and were promptly paid,

and that no demand was ever made upon the defendant for payment for cooking steam until the fall of 1902, when, owing to the extraordinary price of coal, the plaintiff made close examination into the matter of steam and discovered the facts. The plaintiff's husband was her general agent in the management of the building, was frequently in and about it, including the leased premises, and he generally presented the monthly bills and received payment therefor. The judge found that he, in the exercise of reasonable and proper care, should have known the facts about the connection and the use.

The right to the use was conditional, it is true, but we agree with the trial judge that the condition was not that the steam which the defendant was to have from the plaintiff's pipes should cost absolutely or mathematically nothing, but that the defendant should be entitled to have furnished by the plaintiff steam which, having relation to the entire plant and the defendant's business, should be of no considerable cost to the plaintiff. Whether at any time the steam used by the defendant was of any considerable cost to the plaintiff, or, in other words, whether at any time the defendant was using steam in violation of this condition was a matter within the peculiar knowledge of the plaintiff, and not of the defendant.

Here, then, is a case where a defendant, intending to act under the terms of his lease and not otherwise, asks for the connection in order that he may use the steam, the connection is made by the engineer of the plaintiff for that purpose, and the defendant, acting all the time in good faith, proceeds to use the steam. There is no fraud or secrecy on his part. He believes, and has reason to believe from the conduct of the plaintiff and her husband, that all this is known to her and that she acquiesces. Under these circumstances justice to the defendant requires that he should be notified that, in the opinion of the plaintiff at least, the use of the steam is no longer within the terms granted in the lease, so that the defendant may choose whether to discontinue the use, or try to make some new arrangement. And the ignorance of the plaintiff due to her own want of proper care in the management of her business, and not in any way to the conduct of the defendant, does not excuse her from giving such notice. The ruling that the plaintiff cannot

recover for steam furnished before such a notice was right. See *Boston Ice Co. v. Potter*, 123 Mass. 28. In accordance with the terms of the report there must be

*Judgment on the finding for \$1,322.69 and interest.*

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JOHN C. LAING vs. ANTHONY D. MITTEN.

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191 592

Middlesex. January 13, 1904. — February 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Malicious Prosecution. Damages. Slander. Evidence.*

In an action for malicious prosecution the judge in substance told the jury, that the burden was upon the plaintiff to prove that in instituting criminal proceedings the defendant acted maliciously and without probable cause, and that upon the question of probable cause the jury were not to take into consideration the fact of acquittal, but were "to deal with the case as though it were new" before them, "and say whether there was a probable cause for it under all the circumstances." *Held*, that this portion of the charge was sufficiently favorable to the defendant.

In an action for malicious prosecution the judge in his charge at first told the jury that the defendant, if they found against him, was to be held liable for all the results of the prosecution "no matter what happened", but subsequently corrected this statement by a direction to hold the defendant liable only for that "which would naturally arise from the service of the process or which naturally might be expected" to happen as "the natural consequence of the service of the process." *Held*, that this gave the defendant no ground for exception.

In an action for malicious prosecution, if it appears that the defendant started a prosecution resulting in the arrest of the plaintiff, the defendant, although not liable for any acts of the arresting officer done in excess of the authority conferred by his warrant, may be held liable for everything done within such authority, whether the officer acted with the greatest possible consideration toward the plaintiff or not.

Words used in a complaint made to a magistrate having jurisdiction to receive it, and in testimony given before a court of competent jurisdiction on the trial of the complaint, are spoken in the course of judicial proceedings, and, if pertinent to the matter in hearing, are absolutely privileged even if uttered maliciously.

The exclusion of evidence involving collateral issues is within the discretion of a trial judge.

TORT, against a captain in the Volunteer Militia of Massachusetts by a member of his company, with three counts, respectively for alleged false imprisonment, slander and malicious prosecution. Writ dated March 24, 1902.



At the trial in the Superior Court before *Hardy, J.*, the jury returned a verdict for the plaintiff on all three counts, assessing damages respectively in the sums of \$150, \$200 and \$300. The defendant alleged exceptions.

*W. H. Bent*, for the defendant.

*J. J. Hogan*, for the plaintiff.

HAMMOND, J. The amended declaration contained three counts, the first for false imprisonment, the second for slander, and the third for malicious prosecution. The questions before us arise upon the rejection of two letters offered by the defendant, and upon the instructions to the jury upon the second and third counts.

1. As to the count for malicious prosecution. The defendant stoutly contends that the charge to the jury upon this point was contradictory and confusing, and that it must have misled them. While some of the sentences, considered apart from their setting, might seem to give color to this criticism, still upon a careful reading of the charge we are of opinion that in substance the jury were told that the burden was upon the plaintiff to prove that in instituting criminal proceedings the defendant acted maliciously and without probable cause, and that upon the question of probable cause the jury were not to take into consideration the fact of the acquittal, but were "to deal with the case as though it was new before" them, "and say whether there was a probable cause for it under all the circumstances." While upon the question of damages the jury were at first told that the defendant was to be held liable for all the results of the prosecution "no matter what happened," this statement was subsequently corrected so as to hold the defendant liable only for that "which would naturally arise from the service of the process or which naturally might be expected" to happen as "the natural consequence of the service of the process." As thus construed, the charge both as to liability and damages was sufficiently favorable to the defendant.

The defendant was not liable for any acts of the officer done in excess of the authority conferred by the warrant, but having started the prosecution he was liable for everything done within such authority, and that was so, even if the officer might have

been a little more considerate than he actually was. *Adams v. Freeman*, 9 Johns. 117. *Welsh v. Cochran*, 63 N. Y. 181.

It may be said in passing that while the bill of exceptions recites that "the arrest was made in an unusual manner, and with acts of unnecessary and unwarrantable cruelty and indignity," the acts which are set forth in the bill, with the possible exception of the confinement in a cell not sufficiently warmed (and even this might have occurred with no fault upon the part of any person), are all plainly within the authority of the precept under which the officer acted. Unless there were acts besides those shown in the record to which the words "unnecessary" and "unwarrantable" are applicable, the words would not seem to imply an act beyond the authority of the process. The exceptions applicable to this count must therefore be overruled.

2. As to the count for slander. It appeared that the alleged slander consisted of the words spoken by the defendant to the magistrate, importing that the plaintiff had assaulted the defendant and struck him with a door knob, and also of the testimony to the same effect given by the defendant as a witness upon the trial of the complaint. The complaint was made to a magistrate having jurisdiction to receive it, and the trial took place in a court of competent jurisdiction. These words were therefore spoken in the course of judicial proceedings, and being pertinent to the matter in hearing, were absolutely privileged, even if uttered maliciously. *Hoar v. Wood*, 3 Met. 193. *Kidder v. Parkhurst*, 3 Allen, 393, 396, and cases cited. *Watson v. Moore*, 2 Cush. 133, 138. *Morrow v. Wheeler & Wilson Manuf. Co.* 165 Mass. 349. The instructions to the jury allowing them to find for the plaintiff upon this count if they found that these statements thus made in the course of judicial proceedings were not made in good faith, were erroneous. It is suggested by the plaintiff that the jury might have founded their verdict upon the evidence which tended to show that the same words were spoken also at the armory, but we cannot know that such is the fact. The exceptions to the instructions so far as applicable to this count must be sustained.

3. There was no error in the exclusion of the letters. Whether the letter of February 15 showed bias, and to what

extent, depended somewhat upon whether the statements therein contained were true or false, and the judge may well have thought that its admission would lead to an extended inquiry upon matters remote from the true issues. The letter of February 25 was so far remote from the true issues as to throw no light upon them. Both letters were properly excluded at the discretion of the judge.

*Exceptions as to the second count sustained; other exceptions overruled.*

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### AMERICAN TUBE WORKS vs. MARY A. TUCKER.

Suffolk. January 15, 1904. — February 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Practice, Civil, Exceptions. Executor. Agency. Estoppel.*

Where other evidence besides an auditor's report has been introduced at a trial, no exception lies to a refusal to rule that on the facts and findings in the auditor's report the auditor's general finding was not warranted, and that on the facts as stated by the auditor in his report the jury must find the other way, it being within the discretion of a trial judge to refuse a request for a ruling upon the effect of only a part of the evidence considered separately from the rest.

In an action against a widow as executrix under the will of her late husband, on an account annexed and certain promissory notes, for liabilities alleged to have been incurred by the defendant through her son as agent, the notes being signed in the name of the estate of the defendant's husband by the son as attorney, it appeared, that the defendant's husband was a plumber, and that for nine months before his death the business had been wholly in charge of the son, that by his will the defendant's husband bequeathed his business to his son, with all stock in trade, book accounts and contracts, on condition that the son should make various other payments and also pay the "debts owing . . . on account of the business", and directed "that the written promise or guarantee of my said son, C., to the executrix of my will . . . that he will comply with and perform all the provisions, conditions and requirements of the bequest of the business as aforesaid, shall be sufficient to vest in my said son, C., the said business and property thereto appertaining." The son, without executing a written guaranty and before performing all the conditions named in the will, assumed and carried on the business on his own account with the consent of the executrix. The son in carrying on the business kept a bank account in the name of his father's estate and drew checks signed in the name of his father's estate by himself as attorney. The defendant signed a power of attorney authorizing her son to draw as her attorney any check upon this account, and to indorse for deposit and collection any check payable to the estate. The son testified that he wanted this power because checks kept coming in in the name of the estate. It appeared however

that the plaintiff never knew of this power of attorney, and it did not appear that the plaintiff relied in any way upon the form of check or signature. The jury found for the defendant. *Held*, that this verdict was justified, there being evidence on which the jury could find that the son was carrying on the business on his own account and not as agent of the defendant, and also could find that the plaintiff was not misled by the acts of the defendant so as to create an estoppel.

CONTRACT, against the executrix under the will of Isaac N. Tucker, late of Boston, with three counts, one upon an account annexed for \$2,593.31 with interest from May 31, 1901, and the other two counts on promissory notes, each for \$927.57, given in part payment of the account declared on in the first count. Writ dated July 16, 1901.

In the Superior Court the case was tried before *Aiken*, J. The will and codicil of Isaac N. Tucker contained the following:

"First. I nominate and appoint my wife, Mary A. Tucker, to be the executrix of this my last will and testament, and I request that she be not required to furnish a surety or sureties on her official bond. Second. I give and bequeath unto my sons, Charles B. and John D. Tucker, or the survivor of them, the business now carried on by me, together with all stock in trade, apparatus, tools and utensils, books and book accounts, contracts, and all things pertaining to said business. . . . Whereas my said wife, Mary A. Tucker, did in the month of June, 1899, pay out of her money, sundry bills for me, amounting to about \$1025.00, for which she has not been reimbursed, I direct my said sons, Charles B. and John D. Tucker, or the survivor of them, to pay unto my said wife, unless she shall have been repaid before my death, the sum or sums so paid out by her for me, and that such payment by them shall be a condition, in addition to debts owing to other people on account of the business and the bequests hereinafter contained, to the vesting in them of the bequest, contained in the second clause of my will. I further direct my said sons, or the survivor of them, to pay out of the business bequeathed to them the sum of \$25 per week to my daughter, Grace B. Tucker, until the day of her marriage. I further direct my said sons, or the survivor of them, to pay out of the business aforesaid the sum of \$25 per week to my said wife until January 1, 1901. I further direct

my said sons, or the survivor of them, to pay out of the business all bills due on account of household expenses at date of my death, and such sums as shall be received under the sanction of the Judge of the Probate Court for the purchase of a suitable lot in the cemetery, erection of a monument, and the payment of the funeral expenses. I further direct that my said sons, or the survivor of them, shall pay from the said business the expense of putting into a tenantable condition, unless the same shall be done prior to my decease, the house No. 20, on Kendall Street, in said Boston, the same now being vacant and untenable. I hereby confirm the provisions of my said will and codicil heretofore made except as above altered. . . .

“Know all men by these presents, that whereas I, Isaac N. Tucker, did by instrument dated January 27, 1898, make my will and testament to which I have added codicils dated August 26, 1899, and September 11, 1899, and desire to add a third codicil thereto, having in mind the welfare of my family and estate and future conduct of the business wherein I have for many years been engaged, and being satisfied that the other provisions of my will and codicils will be better and more satisfactorily carried out and performed if the said business shall be in the hands of my said son Charles, only, than if left to my said sons Charles and John or the survivor of them, as heretofore provided, inasmuch as said John has not shown himself capable of managing discreetly the said business in whole or in part, but has been unsatisfactory to me in his conduct in business and otherwise.

“Now therefore I do hereby revoke the bequest in the second clause of my said will wherein I gave the business aforesaid to my said sons, Charles B. and John D. Tucker, or the survivor of them, and instead thereof I do hereby give and bequeath unto my said son, Charles B. Tucker, the said business together with all stock in trade, apparatus, tools and utensils, books and book accounts, contracts and all things appertaining to said business, subject, however, to the same conditions as were by me imposed thereon in and by the provisions of said will and codicils or either of them, and wherever in said will or either of said codicils I have used the words ‘Charles B. and John D. Tucker, or the survivor of them’, or the words, ‘my said sons or the survivor of them’,

said words shall be stricken out and instead thereof the words, 'my said son, Charles B. Tucker,' shall be used; and I further direct, and it is my will, that the written promise or guarantee of my said son, Charles B. Tucker, to the executrix of my will or to the administrator with the will annexed, that he will comply with and perform all the provisions, conditions and requirements of the bequest of the business as aforesaid, shall be sufficient to vest in my said son, Charles, the said business and property thereto appertaining; and whereas I am now contemplating raising a sum of money for the immediate needs of the said business by the sale or mortgage of portions of my real estate, I further direct, and it is my will, that such sum or sums as shall be raised by sale or mortgage as aforesaid and devoted to the use of the business shall likewise be repaid, as soon as conveniently may be done, out of the business by my said son, Charles; and if there shall be a sale of any real estate for said purpose, the money so repaid by my said son, or so much thereof as represents the proceeds of the sale, shall be regarded and treated in the settlement of my estate in all respects in the same manner as the real estate so sold would have been treated; if said money is raised by mortgage the interest thereon shall be paid by my said son Charles, until he shall repay the principal, and if by sale then he shall pay to the estate interest at current market rate until he shall pay the amount so realized from said sale; so much of the sum repaid by him as represents the proceeds of mortgage indebtedness hereafter incurred by me for business purposes as aforesaid shall be by my estate applied to the payment of such indebtedness. In all other respects I confirm said will and codicils. . . ."

At the close of the evidence the plaintiff requested the judge to rule and to instruct the jury as follows: "1. On all the evidence your verdict must be for the plaintiff. 2. Upon the facts and findings reported by the auditor, his general finding for the defendant was not warranted or justified as matter of law. 3. If you find the facts to be the same as stated by the auditor in his report your verdict must be for the plaintiff. 4. Your verdict must be for the plaintiff, unless you find facts, other than those reported by the auditor, warranting a different conclusion or unless you find that the facts are different in

some respect from what they are stated by the auditor to be.” “12. If you find that the business came into the possession of the defendant as executrix and that Charles B. Tucker never complied with the conditions stated in the will and codicils on which the vesting in him of the business was made to depend, and that there was never any bill of sale or actual transfer of the business to Charles B. Tucker, then the business did not belong to him.” “17. The expression, ‘the estate of’ a deceased person, means and alludes to the personal representative of that estate, that is, the executor or administrator.”

The judge refused to give the instructions numbered 1, 2, 3 and 4, and refused to give the requests numbered 12 and 17 except so far as incorporated in his instructions to the jury. The jury returned a verdict for the defendant and the plaintiff alleged exceptions.

*J. P. Crosby*, for the plaintiff.

*A. M. Lyman*, (*L. D. Jennings* with him,) for the defendant.

HAMMOND, J. The plaintiff seeks to hold the defendant first upon the ground that she as executrix of the will of her late husband Isaac N. Tucker was carrying on the business through her son Charles as her agent, and second on the ground that she, by her acts and omission to act when she should have acted and by her conduct in general, permitted Charles to hold himself out as conducting the business for the estate and the plaintiff in reliance upon that representation parted with its goods, and that therefore she is estopped to deny that she is individually responsible to the plaintiff. Shortly stated, the contention of the plaintiff is that the defendant is responsible either because she was the contracting party, or because she is estopped to deny that she was.

The second, third and fourth requests relate simply to the case as shown in the auditor's report, and, inasmuch as there was other evidence introduced at the trial, they are open to the objection that they were requests for a ruling upon the effect of only a part of the evidence considered separately from the rest, and it is well settled that that is a sufficient reason for the refusal of the court to give them. We pass, therefore, to the consideration of the first request, which was in substance that on the evidence a verdict should be ordered for the plaintiff.

At the death of the husband in October, 1899, the situation was peculiar. He had been carrying on the plumbing business for years, but for the last few months of his life he had not been able to attend to it, and the son Charles "had been in entire charge thereof, consulting often with his father." The will contained a bequest to Charles of "the business now carried on by me, together with all stock in trade, apparatus, tools and utensils, books and book accounts, contracts, and all things pertaining to said business." Several conditions were annexed to the bequest, one of which was that in addition to other sums Charles should pay the "debts owing . . . on account of the business." The plain intent of the testator was that Charles, upon complying with the conditions or giving a guarantee of compliance, should take the business as it was, with the right to all the assets, including book accounts and unfinished contracts, and should be liable to pay all the business liabilities then existing. In a word, the testator intended that both as to assets and liabilities his son should stand with reference to the business as he, the testator, stood at the time of his death.

After the death of his father, Charles assumed charge and control of the business, and the defendant, neither as executrix nor as an individual, assumed any control or drew any money from the business; and the evidence tended to show that both the defendant and Charles believed that upon the death of the father the business passed under the will to Charles as his own, and that he took possession and carried it on not as the agent of his mother but as legatee under the will. It is true that he collected the bills which were unpaid at the time of his father's death, and that he paid many of the business debts left by his father, but in doing all this the jury might have found that as between him and the estate he was acting under the rights granted to and the responsibilities imposed upon him as legatee by the will. To a certain extent, so far as respected the business, he had upon this view assumed as legatee to do what ordinarily is done by an executor. If he was thus acting, the fact is important and it furnishes a reasonable explanation of his conduct in doing in the business many things the duty to do which primarily rested upon the executrix.



So far as respects the inventory sworn to a few weeks after the testator's death and filed in the Probate Court in June, 1900, it may be said that since the property in the business was a part of the assets of the testator's estate it was the duty of the executrix to charge herself with it in the inventory; and that was so, even if she had delivered the property to the legatee. Nor do we think that the method of keeping the bank account, as it is explained by the witnesses, is conclusive in favor of the view that the defendant was carrying on the business.

It is urged, however, by the plaintiff that the son had not complied with the conditions of the bequest, and that therefore the defendant had no right to turn the business over to him; and the twelfth request embodies that proposition in substance. Upon that point the jury were instructed to the effect that this requirement of a guarantee was for the protection of the beneficiaries under the will, and that if the executrix saw fit to turn over the business to Charles without a guarantee or before a performance of the conditions named in the will, she might be liable to any parties aggrieved by that action, but that the plaintiff was not such a party, so far as material to this case; and that while the fact that Charles had not complied with the conditions could be taken into consideration upon the question whether the business had been turned over to him, still it would not prevent Charles from carrying on the business on his own account. This seems to us to be correct. The question was whether Charles was actually carrying on the business on his own account with the consent of the executrix, and not whether she ought to have consented. Without a further recital of the evidence it is sufficient to say that the question whether the business was being carried on by the son on his own account, or as agent for the defendant, was a question of fact, and that in the evidence before the jury there is no fact conclusive against the validity of the finding that the son carried on the business on his own account. So far therefore as respects the first ground upon which the plaintiff relies, it was not entitled as matter of law to a verdict in its favor.

We now pass to the question of liability by estoppel. Assuming that the defendant did not carry on the business, has her conduct been such as to estop her from setting up that

defence? The auditor finds that "the plaintiff and its agents never knew, saw or had any communication with the defendant," that she had nothing to do with the business, and that "there was no evidence that the plaintiff was misled by any verbal statements to it, either by Charles B. Tucker or by the defendant." He also reports that while the defendant never gave any notice to the plaintiff that she was not carrying on the business or that the estate was not carrying it on, or that any change had been made in it, or that Charles B. Tucker was not her agent, still she testified before him that she never gave any authority to Charles to "purchase goods of the plaintiff, or of any one, in the name of the Estate of I. N. Tucker, and that she never gave him authority to sign promissory notes for her, or for the estate of I. N. Tucker." The auditor further finds that "the goods in the account of the plaintiff were never . . . delivered to her." He further finds that "it did not appear when the plaintiff had actual notice of the death of Isaac N. Tucker," but that "the plaintiff's account was carried along in its books as charged to I. N. Tucker, until May 4, 1900, after which all charges in the account were made to 'Estate of I. N. Tucker'"; that the defendant "never knew or heard of the plaintiff until this action was brought," but that "she knew that the business was being conducted, in part, under the name of I. N. Tucker, and, Estate of I. N. Tucker"; and that "the defendant supposed, and was acting under the belief, that Charles B. Tucker had a right under the will to take the property as his own." While there was considerable other evidence, still the jury may have thought that the auditor's conclusions upon these various points were right.

Upon the question of estoppel, the plaintiff chiefly relies, however, on the conduct of the defendant with reference to the bank account kept in the name of "Estate of I. N. Tucker." The auditor finds that Charles used this and no other bank account in his business, drawing checks under the style of "Estate of I. N. Tucker, by Charles B. Tucker, attorney." The defendant never drew any checks on this account. It appears that in December, 1899, the defendant signed a power of attorney authorizing Charles to draw as her attorney any check upon this account, and to indorse for deposit and collection any check

payable to the estate, whether in the name of I. N. Tucker or Estate of I. N. Tucker, or herself as executrix. Charles testified before the auditor that he wanted this power because "checks kept coming in in name of the Estate of I. N. Tucker." The jury may have found from all the evidence, including the testimony of Charles and the defendant, that inasmuch as the old bills due the estate on account of the business as well as those due from the estate on the same account were to be settled in the name of the estate by Charles, in accordance with the conditions of the bequest to him, the purpose in giving this power of attorney was to enable him to do this part of the business, primarily a part of the defendant's duty as executrix, and that with one or two exceptions, she never knew or supposed that he was using the power for any other purpose. Moreover it is to be observed that the check of July 27, 1900, the only one set out or described in full, although signed by Charles as attorney for the estate, is payable not to the plaintiff but to the order of Charles B. Tucker and is indorsed by him. It does not distinctly appear that any check signed in this way was ever made payable upon its face to the plaintiff, and each one may have been in the same form as the one just named. It is true that the notes were made payable to the order of the plaintiff, but that is not material on the question of the estoppel by the power of attorney. The evidence tends to show that the defendant never knew of the notes before the suit was begun. It is true that the auditor has found that the defendant knew the business was being conducted in part under the name of I. N. Tucker and Estate of I. N. Tucker, but that knowledge would not of itself make her liable.

But we do not further discuss the matter of her conduct with reference to the alleged estoppel because it was a question for the jury whether the plaintiff was in any way misled by her actions as to the checks or in any other respect. The plaintiff never knew anything of this power of attorney, it does not appear that any single check signed thereunder was made directly to the plaintiff, or that the plaintiff relied in any respect upon the form of the check or signature in parting with its goods. While a strong argument might be made to show that the plaintiff was misled, still no witness called by the plaintiff testified to

that effect. It is plain that on the evidence the questions arising out of the alleged liability on the ground of estoppel were questions for the jury. The judge therefore properly declined to give the first ruling requested.

As already stated, the twelfth request was properly refused.

The instructions to the jury as to the matter contained in the seventeenth request were accurate and sufficiently full.

*Exceptions overruled.*

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ALBERT MEHLINGER vs. HIRAM P. HARRIMAN.

185 245  
183 234

Suffolk. January 16, 1904. — February 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Bills and Notes.*

If one receiving an accommodation note agrees not to sell it to A., and thereupon takes it to A. who lends money to B. with which B. purchases the note, and B. holds the note until he sells it to a *bona fide* purchaser, this does not show that the note was put into circulation fraudulently.

If one purchases an accommodation note for cash and sells it to a *bona fide* purchaser in exchange for the purchaser's own note, the purchaser may be found to be a holder of the note in due course within the meaning of R. L. c. 78, § 69, and entitled to recover its face value.

CONTRACT on a promissory note of the defendant for \$500 dated October 9, 1902, payable three months after date to the defendant himself and indorsed in blank by him. Writ dated January 31, 1903.

In the Superior Court the case was tried before *Schofield, J.*, without a jury. The judge found that the note in suit was made by the defendant on October 9, 1902, and delivered by him on that day to Simeon Marcus, without consideration, for the accommodation of Simeon Marcus and his father. Another note of like amount and tenor, except that it was payable in two months, was made and delivered by the defendant to Marcus at the same time. This note also was without consideration. Both notes were delivered to Marcus by the defendant subject to an oral agreement made with Marcus at the time of delivery by which Marcus was not permitted to negotiate the

notes or either of them to Mr. Thomas Riley. After their delivery, and on the same day, Marcus endeavored to sell the two notes to Riley. Riley, as soon as the notes were offered to him, went with Marcus to Mr. Charles F. Smith, his nephew, an attorney at law having an office with him, and lent Smith \$500. Smith thereupon purchased the two notes and paid for them with the \$500 borrowed from Riley. Marcus delivered the notes to Smith upon receiving the money. This transaction was a purchase and sale of the notes, and not an advance upon the notes as security. Smith held the note in suit until a few days before its maturity, when he delivered it to the plaintiff and at the same time received in return the note of the plaintiff, which he now holds. This note was the only value which the plaintiff gave or agreed to give for the note. A week or ten days before the note in suit was made, the defendant notified Mr. Riley orally in his office that all his notes to Marcus were accommodation paper, and forbade Riley to purchase any of them. Smith was present and heard this notice given. The plaintiff at the time he received the note in suit from Smith had no notice of the fact that it was an accommodation note or of the oral agreement between the defendant and Marcus made when the note originally was given.

The defendant requested the judge to rule that upon the evidence the plaintiff could not recover, that he could recover only the amount paid for the note, and that the note was not taken in due course of business within the meaning of R. L. c. 73. The judge refused to make any of these rulings. He found that the plaintiff was a holder of the note in due course, entitled to enforce payment in full against the defendant, and found for the plaintiff in the sum of \$507.50. The defendant alleged exceptions.

*W. B. Orcutt*, for the defendant.

*A. Mehlinger*, *pro se*.

HAMMOND, J. At the time the defendant delivered the note to Marcus there was an oral agreement between them by which Marcus was not permitted to negotiate it to Riley. Although apparently Marcus attempted to violate that agreement, still he did not succeed, for the judge finds that Smith purchased the note of Marcus and thereafter held it until he sold it to the

plaintiff. It is not shown therefore that the note was fraudulently put into circulation. The judge further finds that before its maturity the plaintiff became a *bona fide* purchaser, giving as a consideration therefor his own note to Smith, who still holds it. These findings are warranted by the evidence. The plaintiff upon the facts found by the judge took the note in due course of business, R. L. c. 78, § 69, and, there being no fraud, is entitled to recover its full value.

*Exceptions overruled.*

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NELLIE KEEFE vs. NORFOLK SUBURBAN STREET RAILWAY COMPANY & another.

Suffolk. January 19, 1904. — February 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Evidence. Practice, Civil. Damages.*

In an action against a street railway company for personal injuries, the defendant relied on a document purporting to be a release executed by the plaintiff. The plaintiff testified that she was induced to sign this paper by the fraud of a certain claim agent of the defendant, and was allowed against the objection of the defendant to state the portion of the conversation that she had with this claim agent which occurred after she had signed the paper. *Held*, that the admission of the evidence was not error, it being part of the conversation during which the paper was signed and having a bearing upon the plaintiff's good faith in alleging fraud.

On the argument of exceptions, the answer of a witness cannot be objected to as non-responsive, if at the trial the only objection to the testimony was on the ground that it was not admissible.

Whether the climacteric of an unmarried woman about forty years old may occur before she has recovered from the results of a street railway accident and thus prolong her suffering, was held on the evidence in this case to be a question of fact for the jury.

TORT, against the Norfolk Suburban Street Railway Company and the West Roxbury and Roslindale Street Railway Company, for personal injuries alleged to have been sustained by reason of the derailment of a car of the last named defendant, upon which the plaintiff was a passenger, at Hyde Park on the morning of January 30, 1900. Writ dated April 18, 1900.

At the trial in the Superior Court before *Harris, J.* it was admitted that the plaintiff was in the exercise of due care at the time of the accident, and the West Roxbury and Roslindale Street Railway Company introduced no evidence to show that the accident was not due to its negligence, but did not admit its liability.

That defendant contended and offered evidence to show that the plaintiff had released her claim against it by the execution of a certain paper which the defendant asserted to be a valid release, so that the plaintiff could not maintain an action against it, and denied that the plaintiff had sustained any serious injury by reason of the derailment. The plaintiff testified that her signature to the paper presented as a release was obtained from her through the fraud of one McAloon, a claim agent of the defendant, and that she signed the paper because McAloon told her that it would show the railway company that he had given her an order upon the physician to attend her. Her testimony as to the conversation with McAloon after her signing the paper, which was admitted against the objection of the defendant, was as follows: "After I signed the note he told me when I was all better to come down to Quincy, and he gave me his name and address, but I have forgotten it. He said he would settle all my claims. I have never been able to get that far and I have never seen him since. He knew where I lived but he never came to me."

The plaintiff introduced evidence tending to show that she would be forty years of age in March, 1903; that before the accident she had been a well, strong woman, but that since it occurred she had suffered more or less pain and discomfort, and had felt unable to work. The defendant excepted to the admission of the evidence described in the opinion as to the likelihood that the plaintiff's suffering would be prolonged if she should reach her climacteric before she recovered from the effects of the accident.

The jury returned a verdict for the plaintiff in the sum of \$5,150 against the West Roxbury and Roslindale Street Railway Company, and returned a verdict for the other defendant, the Norfolk Suburban Street Railway Company. The West Roxbury and Roslindale Street Railway Company alleged exceptions.

*H. F. Hurlburt*, (*D. E. Hall* with him,) for the West Roxbury and Roslindale Street Railway Company.

*J. E. Cotter*, (*T. F. McAnarney* with him,) for the plaintiff.

HAMMOND, J. 1. We think no error of law appears in the admission of the statements made to the plaintiff by McAloon in the same conversation in which she alleges she was fraudulently induced to sign the release, although they were made after she had signed it. While it may be true that they could not have formed any part of the statements which induced her to sign, yet they were a part of the conversation during which the paper was signed and had a bearing at least upon her good faith in pressing the claim of fraud, and to meet the argument likely to be made by the defendant that this claim was an afterthought on her part. It is argued by the defendant that this part of the plaintiff's testimony was not responsive to the question put to her. It was certainly responsive to the question as originally put, and the colloquy between the two counsel does not show that her counsel ever withdrew that question; but, however that may be, the point that the answer was not responsive to the question was not then taken by the defendant, and it is manifest that the judge understood, and properly, that the objection of the defendant was based solely upon the ground that the testimony was not admissible. The objection that it was not responsive cannot now be of avail to the defendant.

2. At the time of the trial the plaintiff was thirty-nine years and eleven months old, and her contention was that, if she should reach her climacteric before she had fully recovered, her suffering might be prolonged as one of the results of the accident. The defendant contended that upon the evidence the possibility that the plaintiff would reach her climacteric before her full recovery from the accident was so remote that it should not be considered by the jury as an element of damage; and at the close of the evidence asked the judge so to rule. The judge declined to rule as requested, and submitted this question to the jury, with instructions to which we do not understand the defendant to object except so far as inconsistent with the ruling requested. While the evidence tended to show that the average age of married women at the time the climacteric occurs is about forty-five or forty-six years, and of un-



married women a year or two earlier, yet it tended also to show that sometimes it occurred when the woman was only thirty years of age, and sometimes not until after she was fifty-five; and the physician who attended the plaintiff testified that she was at the age when the change of life might come, and "if that comes at the age of forty, as it oftentimes does with unmarried women, it may prolong her nervous condition and keep her from rapidly recovering her health." An expert physician called by the plaintiff testified that she was getting better now, and that it was "only a question of time when she will get well, provided the climacteric does not come on very soon," that this period in the case of an unmarried woman "is liable to come at forty years of age." Another expert called by the plaintiff testified that "if the change of life should develop within the course of the next two years I think that that would have a tendency to delay the recovery very much."

It is true that there was much testimony to show that, after all, the chances seemed to be against the occurrence of the climacteric until after full recovery; still, in view of all the evidence, it cannot be said as matter of law that the likelihood that the climacteric would not occur until after full recovery from the effects of the accident was so remote as to call for the instruction requested by the defendant. The whole question was one of fact for the jury. The remaining exceptions having been waived, are not considered.

*Exceptions overruled.*

## ALBERT F. HOUGHTON &amp; others vs. CAROLINE C. FURBUSH.

Suffolk. January 27, 1904. — February 27, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Damages.*

In an action by a publisher for damages for a refusal to receive and pay for a special set of the works of a certain author ordered by the defendant, where the only question relates to the assessment of damages, the plaintiff is entitled to recover his loss of profit caused by the defendant's breach of the contract, and therefore a request for a ruling that the plaintiff can recover only nominal damages or only the actual expense incurred before the order was countermanded should be refused. *Whether*, in such a case, on the receipt of a countermanding order from the defendant, it would be the duty of the plaintiff at once to stop work on the set of books to make the damage to the defendant as light as possible, *quære*.

CONTRACT, alleging, after the amendment described in the opinion, a refusal of the defendant to receive and pay for a special set of Hawthorne's works made for the defendant under a contract in writing signed by her. Writ dated October 6, 1902.

In the Superior Court the case was tried before *Sherman, J.*, without a jury. The trial took the course described in the opinion. The contract sued upon was as follows: "Messrs. Houghton, Mifflin & Co., Boston. Gentlemen: I hereby subscribe for one special set of Autograph Edition of Hawthorne's works, in twenty-two volumes, with all hand-colored plates, bound in full French Levant, with double finish and watered silk linings, with special design, hand tooled, for which I agree to pay fifty dollars per volume. C. C. Furbush, Greenfield, Mass. Date, Jan. 31, 1901."

Upon the amended declaration the judge found for the plaintiffs in the sum of \$561; and the defendant alleged exceptions, raising the questions stated by the court.

*D. Malone*, for the defendant.

*S. W. Forrest*, for the plaintiffs.

HAMMOND, J. The original declaration contained three counts, the first being on an account annexed apparently as

for goods sold and delivered, the second being for balance due the plaintiffs on an accounting together, and the third being for interest. The answer contained a general denial, and set up fraud on the part of the plaintiffs. Upon these pleadings the case went to trial. At the close of the evidence the defendant asked the judge to rule in substance that upon the whole evidence the plaintiff could not recover; and that "the action should have been for damages for the breach of a special contract." The defendant also requested certain rulings as to the rule of damages, and as to fraud. In this state of things the case was argued and submitted to the judge sitting without a jury. Subsequently, without announcing any final decision, the judge notified the counsel for the plaintiffs that in his opinion it was doubtful if the action could be maintained upon the declaration. The counsel for the plaintiffs then moved for leave to amend his declaration by adding thereto a count for breach of contract in refusing to take the books which the defendant had ordered. After a hearing this motion was granted and the defendant excepted. The judge "found for the plaintiffs on the amended declaration in the sum of five hundred and sixty-one dollars as damages for breach of the contract." The defendant excepted to the rulings of the judge and to the refusal to give the rulings requested.

The exception to the allowance of the amendment is not argued, and therefore in view of its nature we consider it waived.

The record discloses no evidence to establish the defence of fraud. The contract when made was binding upon the defendant, and it does not appear that by rescission or otherwise she has been released from it. She must be held, therefore, and the only remaining questions relate to the assessment of damages. Upon this question the defendant requested the judge to rule (1) that the plaintiffs could recover only nominal damages, (2) that they could recover "only the actual expense made before the order was countermanded," and further (3) that "the measure of damages is the difference between the market value at the time and place of delivery and the contract price, and no evidence having been introduced of that difference, the court can award nominal damages only." A short but decisive answer

to the first two requests is that they each exclude from the amount of damages the item of profit which the plaintiffs would have made from the contract. They were therefore properly refused. The last ruling requested was given so far as it stated the rule of damage. So far, therefore, as respected the rule of damage the defendant has no ground for complaint as to the manner in which the judge dealt with her requests. The counsel for the defendant has addressed an argument to us in support of the proposition that upon the receipt of the countermanding order from the defendant it was the duty of the plaintiffs to stop at once and make the damage to the defendant as light as possible, but we have not found it necessary to consider how far the principle that a party to an executory contract, by a notice to the other party of his intention not to comply with its terms, can reduce his liability for damages, is applicable to this case, because we do not think that that question is fairly raised on this record.

While the evidence as to the market value at the time and place of delivery was slight, still we cannot say as matter of law that it did not justify the finding made by the judge.

*Exceptions overruled.*

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### CATHERINE E. STANFORD vs. INHABITANTS OF HYDE PARK.

Norfolk. January 19, 20, 1904. — February 29, 1904.

Present: KNOWLTON, C J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Way, Defect in highway.*

Whether a grade stake fourteen inches high, standing about two feet inside of the location of a highway of a suburban town outside of the wrought roadway, near or opposite a regular stopping place of an electric car line, is a defect in the highway for which the town is liable, is a question of fact for the jury.

TORT for personal injuries from an alleged defect in River Street, a highway of the defendant. Writ dated October 28, 1901.

In the Superior Court the case was tried before *Sherman, J.* It appeared, that the alleged defect consisted of a grade stake

standing about two feet inside of the line of the location of the highway and outside of the wrought roadway, the stake being about fourteen inches above the surface of the ground, two and one half inches wide and two inches thick, and situated near or opposite a white post which was a stopping place of an electric car line. There was evidence that the plaintiff, with her husband and three small children, was travelling in an open car which stopped at the white post, that after the car stopped the plaintiff's husband got down and helped the children, and then helped his wife who carried a baby in her arms, and that the plaintiff thus having alighted tripped over the stake and fell.

The judge refused to give the following instructions, requested by the defendant, which are referred to by the court: "1. Upon all the evidence the plaintiff is not entitled to recover. 2. Upon all the evidence, East River Street in the defendant town was reasonably safe and convenient for travel. . . . 7. There is no evidence in this case that either the sidewalk or the carriageway of East River Street was defective."

The jury returned a verdict for the plaintiff in the sum of \$1,250; and the defendant alleged exceptions.

*J. E. Cotter*, (*T. F. McAnarney* with him,) for the defendant.

*C. F. Choate, Jr.*, for the plaintiff, was not called upon.

HAMMOND, J. This is a very plain case. There was but little conflict in the evidence; and it is unnecessary to recite it in detail or to cite authorities to show that the questions whether the plaintiff was in the exercise of due care, whether the stake was the cause of the injury, whether in view of the amount and character of public travel in that vicinity the way was reasonably safe and convenient, or by reason of the existence of the stake was defective, whether the defect might have been remedied by reasonable care and diligence on the part of the town, and whether the town had, or by the exercise of proper care and diligence on its part might have had, notice of the defect, are questions, not of law for the court, but of fact for the jury. The first, second and seventh requests were therefore properly refused. The other rulings requested, so far as material, were in substance given.

*Exceptions overruled.*

## FRED MARTELL vs. JAMES N. WHITE &amp; others.

Norfolk. December 9, 1902. — March 1, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; HAMMOND, JJ.

*Conspiracy, Civil action.*

In an action of tort for an alleged conspiracy to injure the plaintiff in his business, it appeared, that the plaintiff was engaged in the business of quarrying granite and selling it to granite workers, and that the defendants were members of a voluntary association of granite workers, who, by the enforcement of a by-law imposing heavy fines for its violation, were coerced into refusing to trade with the plaintiff because he was not a member of the association, whereby his business was ruined. *Held*, that it was error to order a verdict for the defendants, and that the case should have been submitted to the jury.

TORT for an alleged conspiracy to injure the plaintiff in his business of quarrying and selling granite, carried on by him at Quincy. Writ dated March 9, 1899.

In the Superior Court the case was tried before *Bishop, J.*, who, at the conclusion of the evidence, ruled that the plaintiff could not recover, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

*E. R. Anderson*, for the plaintiff.

*J. W. McAnarney*, (*J. E. Cotter* with him,) for the defendants.

HAMMOND, J. The evidence warranted the finding of the following facts, many of which were not in dispute. The plaintiff was engaged in a profitable business in quarrying granite and selling the same to granite workers in Quincy and vicinity. About January, 1899, his customers left him, and his business was ruined through the action of the defendants and their associates.

The defendants were all members of a voluntary association known as the Granite Manufacturers' Association of Quincy, Massachusetts, and some of them were on the executive committee. The association was composed of "such individuals, firms, or corporations as are, or are about to become manufacturers, quarriers, or polishers of granite." There was no constitution and, while there were by-laws, still, except as hereinafter stated,

185	255
188	360
185	255
192	585
192	588
192	590
185	255
194	215

there was in them no statement of the objects for which the association was formed. The by-laws provided among other things for the admission, suspension and expulsion of members, the election of officers, including an executive committee, and defined the respective powers and duties of the officers. One of the by-laws read as follows : " For the purpose of defraying in part the expense of the maintenance of this organization, any member hereof having business transactions with any party or concern in Quincy or its vicinity, not members hereof, and in any way relating to the cutting, quarrying, polishing, buying or selling of granite (hand polishers excepted) shall for each of said transactions contribute at least \$1 and not more than \$500. The amount to be fixed by the association upon its determining the amount and nature of said transaction."

Acting under the by-laws, the association investigated charges which were made against several of its members that they had purchased granite from a party "not a member" of the association. The charges were proved, and under the section above quoted it was voted that the offending parties should respectively "contribute to the funds of the association" the sums named in the votes. These sums ranged from \$10 to \$100. Only the contribution of \$100 has been paid, but it is a fair inference that the proceedings to collect the others have been delayed only by reason of this suit. The party "not a member" was the present plaintiff, and the members of the association knew it. Most of the customers of the plaintiff were members of the association, and after these proceedings they declined to deal with him. This action on their part was due to the course of the association in compelling them to contribute as above stated, and to their fear that a similar vote for contribution would be passed should they continue to trade with the plaintiff.

The jury might properly have found also that the euphemistic expression "shall . . . contribute" to the funds of the association contained an idea which could be more tersely and accurately expressed by the phrase "shall pay a fine," or, in other words, that the plain intent of the section was to provide for the imposition upon those who came within its provisions of a penalty in the nature of a substantial fine. The bill of exceptions recites that "there was no evidence of threats or intimidation

practised upon the plaintiff himself, and the acts complained of were confined to the action of the society upon its own members." We understand this statement to mean simply that the acts of the association concerned only such of the plaintiff's customers as were members, and that no pressure was brought to bear upon the plaintiff except such as fairly resulted from action upon his customers. While it is true that the by-law was not directed expressly against the plaintiff by name, still he belonged to the class whose business it was intended to affect, and the proceedings actually taken were based upon transactions with him alone, and in that way were directed against him alone. It was the intention of the defendants to withdraw his customers from him, if possible, by the imposition of fines upon them, with the knowledge that the result would be a great loss to the plaintiff. The defendants must be presumed to have intended the natural result of their acts.

Here, then, is a clear and deliberate interference with the business of a person with the intention of causing damage to him and ending in that result. The defendants combined and conspired together to ruin the plaintiff in his business, and they accomplished their purpose. In all this have they kept within lawful bounds?

It is elemental that the unlawfulness of a conspiracy may be found either in the end sought or the means to be used. If either is unlawful within the meaning of the term as applied to the subject, then the conspiracy is unlawful. It becomes necessary, therefore, to examine into the nature of the conspiracy in this case, both as to the object sought and the means used.

The case presents one phase of a general subject which gravely concerns the interests of the business world and indeed those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere, but some things at least appear to have been settled, and certainly at this stage of the judicial inquiry it cannot be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that while a person must submit to competition he has the right to be protected from malicious interference with his business. The rule is well stated in *Walker v. Cronin*,



107 Mass. 555, 564, in the following language: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

In a case like this, where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. If the injury be inflicted without just cause or excuse, then it is actionable. Bowen, L. J. in *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 613. *Plant v. Woods*, 176 Mass. 492. The justification must be as broad as the act and must cover not only the motive and the purpose, or in other words the object sought, but also the means used.

The defendants contend that both as to object and means they are justified by the law applicable to business competition. In considering this defence it is to be remembered, as was said by Bowen, L. J. in *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 611, that there is presented "an apparent conflict or antinomy between two rights that are equally regarded by the law — the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others." Here, as in most cases where there is a conflict between two important principles, either of which is sound and to be sustained within proper bounds, but each of which must finally yield to some extent to the other, it frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and, bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through

which at least the line must run and beyond which the party charged with trespass shall not be allowed to go.

While the purpose to injure the plaintiff appears clearly enough, the object or motive is left somewhat obscure upon the evidence. The association had no written constitution, and the by-laws do not expressly set forth its objects. It is true that from the by-laws it appears that none but persons engaged in the granite business can be members, and that a member transacting any business of this kind with a person not a member is liable to a fine; from which it may be inferred that it is the idea of the members that for the protection of their business it would be well to confine it to transactions among themselves, and that one at least of the objects of the association is to advance the interests of the members in that way. The oral testimony tends to show that one object of the association is to see that agreements made between its members and their employees and between this association and similar associations in the same line of business be kept and "lived up to." Whether this failure to set out fully in writing the objects is due to any reluctance to have them clearly appear, or to some other cause, is of course not material to this case. The result, however, is that its objects do not so clearly appear as might be desired; but in view of the conclusion to which we have come as to the means used, it is not necessary to inquire more closely as to the objects. It may be assumed that one of the objects was to enable the members to compete more successfully with others in the same business, and that the acts of which the plaintiff complains were done for the ultimate protection and advancement of their own business interests, with no intention or desire to injure the plaintiff except so far as such injury was the necessary result of measures taken for their own interests. If that was true, then so far as respects the end sought the conspiracy does not seem to have been illegal.

The next question is whether there is anything unlawful or wrongful in the means used as applied to the acts in question. Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that in a more advanced stage of the discussion the day

may come when it will be more clearly seen and will more distinctly appear in the adjudication of the courts than as yet has been the case, that the proposition that what one man lawfully can do any number of men acting together by combined agreement lawfully may do, is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals acting each according to his own preference and that of an organized and extensive combination may be so great in its effect upon public and private interests as to cease to be simply one of degree and to reach the dignity of a difference in kind. Indeed, in the language of Bowen, L. J. in the *Mogul Steamship* case, *ubi supra*, page 616: "Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." See also opinion of Stirling, L. J. in *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600, 621. Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly. Conspicuous illustrations of the destructive extent to which it may be carried are to be found in the *Mogul Steamship* case above cited, and in *Bowen v. Matheson*, 14 Allen, 499. The fact therefore that the plaintiff was vanquished is not enough, provided that the contest was carried on within the rules allowable in such warfare.

It is a right, however, which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. Fight he may, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when

the trader is allowed in his business to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or, in the words of Bowen, L. J. in the *Mogul Steamship* case, *ubi supra*, may adopt "the expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future." In these and many other obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others, and so long as he keeps within the operation of the laws of trade his justification is complete.

But from the very nature of the case it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction or molestation. In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or in other words they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but if he stays in it he is subjected to the coercive effect of a fine to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but on the contrary it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal. *Carew v. Rutherford*, 106 Mass. 1.

Nor is the nature of the coercion changed by the fact that the persons fined were members of the association. The words of Munson, J. in *Boutwell v. Marr*, 71 Vt. 1, 9, are applicable here: "The law cannot be compelled by any initial agreement

of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body, cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association."

In view of the considerations upon which the right of competition is based, we are of opinion that as against the plaintiff the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful.

We do not mean to be understood as saying that a fine is of itself necessarily, or even generally, an illegal instrument. In many cases it is so slight as not to be coercive in its nature; in many it serves a useful purpose to call the attention of a member of an organization to the fact of the infraction of some innocent regulation; and in many it serves as an extra incentive to the performance of some absolute duty or the assertion of some absolute right. But where, as in the case before us, the fine is so large as to amount to moral intimidation or coercion, and is used as a means to enforce a right not absolute in its nature but conditional, and is inconsistent with the conditions upon which the right rests, then the coercion becomes unjustifiable and taints with illegality the act.

The defendants strongly rely upon *Bowen v. Matheson*, 14 Allen, 499, *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25, *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223, *Macaulay Brothers v.*

*Tierney*, 19 R. I. 255, and *Cote v. Murphy*, 159 Penn. St. 420. In none of these cases was there any coercion by means of fines upon those who traded with the plaintiff. Inducements were held out, but they were such as are naturally incident to competition, for instance, more advantageous terms in the way of discounts, increased trade, and otherwise. In the Minnesota case there was among the rules of the association a clause requiring the plaintiff to pay ten per cent, but the propriety or the legality of that provision was not involved. In *Bowen v. Matheson*, it is true that the by-laws provided for a fine, but the declaration did not charge that any coercion by means of a fine had been used. A demurrer to the declaration was sustained upon the ground that there was no sufficient allegation of an illegal act. The only allegation which need be noticed here was that the defendants "did prevent men from shipping with" the plaintiff, and as to this the court said: "This might be done in many ways which are lawful and proper, and as no illegal methods are stated the allegation is bad." This comes far short of sustaining the defendants in their course of coercion by means of fines. As to the other cases cited by the defendant it may be said that, while bearing upon the general subject of which the present case presents one phase, they are not inconsistent with the conclusion to which we have come. Among the authorities bearing upon the general subject and having some relation to the questions involved in this case, see, in addition to those hereinbefore cited, *Slaughter-House cases*, 16 Wall. 36, 116; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Doremus v. Hennessy*, 176 Ill. 608; *Inter-Ocean Publishing Co. v. Associated Press*, 184 Ill. 438; *State v. Stewart*, 59 Vt. 273; *Olive v. Van Patten*, 7 Tex. App. 630; *Barr v. Essex Trades Council*, 8 Dick. 101; *Jackson v. Stanfield*, 137 Ind. 592; *Bailey v. Master Plumbers*, 103 Tenn. 99; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429; *Mogul Steamship Co. v. McGregor*, 15 Q. B. D. 476; 21 Q. B. D. 544; 23 Q. B. D. 598; [1892] A. C. 25.

For the reasons above stated, a majority of the court are of opinion that the case should have been submitted to the jury.

*Exceptions sustained.*

**JAMES T. MOORE vs. DANIEL G. RAWSON & others.**

Suffolk. December 14, 1903. — March 1, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Partnership, Dissolution, Good will, Accounting.*

On the dissolution of a partnership the beneficial interests of the partners in the assets of the firm become several, subject only to the payment of the debts of the firm and the settlement of accounts between the partners.

If, in a suit by a retiring partner against his co-partners for an accounting, it appears, that on the termination of the partnership the defendants wrongfully appropriated to their own use the property of the partnership including the good will, they will be held to account to the plaintiff for the good will in the same way as if they had purchased it or had sold it to a stranger, regardless of the question whether the firm name could have been used without the consent in writing of one of the defendants.

If a partnership has established a business sufficiently permanent in character to include not only the patronage of its customers but the elements of locality and a distinctive name, a good will exists which forms an asset of commercial value in an accounting among partners.

If a partnership agreement provides that interest at a certain rate shall be allowed on all capital furnished by the respective partners, this does not entitle the partners to interest on such capital after dissolution before a balance has been found due and before a reasonable time for winding up the affairs of the firm has elapsed.

Where by a dissolution under the terms of a partnership agreement, which contained no provision as to winding up the business, one of the partners is forced by the other partners to retire, and the remaining partners refuse the retired partner an accounting, and, forming a new partnership, continue the business using the retired partner's share in the property and good will of the old firm as part of their working capital, the remaining partners must account to the retired partner, not only for his share of the partnership property including the good will, but also for his share in all actual profits derived from the property, or must pay him interest on his share of the capital if he so elects. The court in its discretion may allow the remaining partners in accounting for the actual profits to deduct from the net profits such a sum as is found to be attributable solely to their skill and services in conducting the business.

BILL IN EQUITY, filed March 14, 1872, for a partnership accounting, as described in the opinion.

The history of the case is stated briefly in the opinion. On February 20, 1903, *Barker, J.* made an interlocutory order confirming the master's report, after adding to it the following findings of fact:

185	264
186	*282
185	264
188	*535
185	264
191	*348

"At the time of the dissolution of the firm the original defendants knew that the profits had been so large that there was due the complainant a large sum, which by the partnership articles was to be divided upon the dissolution, and which they knew ought in justice to be paid to him by them at the latest when the assets should be reduced to cash, if they assumed the privilege of making that reduction.

"The original answer must either have been an admission of that state of facts or an unwarrantable denial of what the original defendants knew to be the plaintiff's rights, and so must have been an admission of his rights in general terms.

"The defendants reduced the assets to cash by August, 1872, and might have paid off the plaintiff at that date. At the latest they should have paid him off at that date.

"There was no offer to pay any specific sum until late in the year 1873, and the offer then made was of a sum less than was due the plaintiff, although not greatly less if no allowance is to be made him for subsequent profits or for good-will.

"The omission to offer to pay any specific sum until late in the year 1873, the offer at that time of a sum less than was due, and the use of the plaintiff's money in a business carried on by the original defendants with no fresh assets, but only those which came to them from the old partnership, show a deliberate purpose to keep the plaintiff's money and to use it in their continued business for their own benefit on the part of the original defendants, and such purpose and use are found as facts in the case."

On the same day, the justice, with the consent of the parties, reserved the case for determination by the full court, upon the appeals of the plaintiff and of the defendant from the order of the justice, overruling the plaintiff's exceptions to the master's report after amending that report by adding to it the findings above quoted, and confirming it as amended, and also upon the questions of law raised and stated in the master's report, such decrees to be entered as justice and equity might require.

The substance of the master's report appears in the opinion.

The partnership agreement was as follows :

"Articles of co-partnership made and entered into this first day of January, A. D. 1870 by and between D. G. Rawson, J. T.



Moore, both of Newton in the County of Middlesex, W. B. Fay of Upton in the County of Worcester and C. S. Goddard of the City of Worcester in said County of Worcester and all within the Commonwealth of Massachusetts.

"1st. That the undersigned parties aforesaid hereby form themselves into a co-partnership for the ensuing three years, for the purpose of the manufacture and sale of boots and shoes as hereafter set forth, under the firm name of D. G. Rawson & Co.

"2d. The business of said firm is to be the manufacturing of boots and shoes in the City of Worcester and the selling of the same at store No. 98 Pearl Street, in the City of Boston, County of Suffolk and said Commonwealth, and is to continue for the space of three years from the 1st day of January as aforesaid.

"3d. The parties hereto, covenant and agree to and with each other, to place into said firm's business as permanent capital the following sums of money, to wit: W. B. Fay agrees to furnish the sum therefor of Two Thousand Dollars, C. S. Goddard agrees to furnish for the same purpose the sum of Two Thousand Dollars, and D. G. Rawson and J. T. Moore agree to furnish the balance of capital aforesaid sufficient to carry on said business, interest upon all capital furnished to be allowed at the rate of eight per cent yearly.

"4th. The profits of said firm's business are to be divided at the end and expiration of the three years, or at the determination of this co-partnership as hereinafter provided, as follows, to wit:

"D. G. Rawson is to receive of said profits at the rate of 33 1-3 per cent on the whole amount thereof, J. T. Moore is to receive of the whole profit 33 1-3 per cent thereof, and W. B. Fay and C. S. Goddard are to receive each 16 2-3 per cent each of the whole profits, as their several portions of such profits and no more.

"5th. The parties hereto are limited hereby from drawing out from the firm's business respectively as follows:

"D. G. Rawson not exceeding any one year the sum of Two Thousand Dollars; J. T. Moore not exceeding any one year the sum of Two Thousand Dollars; W. B. Fay not exceeding any one year the sum of One Thousand Dollars; and C. S. God-

dard not exceeding any one year the sum of One Thousand Dollars.

"6th. No member of this partnership shall use the firm's name for his benefit, or the benefit of any other persons or firms whatsoever or corporations as endorser, signer, surety or otherwise outside of said firm's business herein set forth, without the written consent of each party constituting the firm of D. G. Rawson & Co.

"7th. The said Fay and Goddard are to devote their time and attention during business hours for and during this co-partnership in superintending and directing the manufacturing of boots and shoes at their place of manufacture in the City of Worcester aforesaid; and the said D. G. Rawson and J. T. Moore have the right at all times to give directions and orders as to the way and manner of carrying forward said firm's business in the manufacturing of boots and shoes under the co-partnership and aside from the aforesaid duty it is the duty of said D. G. Rawson and J. T. Moore to attend on their part to the selling of the boots and shoes manufactured and to be manufactured under those articles of co-partnership upon the most favorable prices and terms that they can secure for said firm.

"8th. Books requisite to reflect the firm's business as to the manufactures aforesaid are to be kept either at Boston or Worcester so as at all times to exhibit the amount of stock and material and the cost thereof used in such manufactures, from whom the same was purchased, and the price thereof, and when paid, or when to be paid, all property entered upon such books when received at said factory, and also requisite books shall be so kept at 98 Pearl Street which shall always exhibit the amount of stock manufactured and received from the factory at Worcester at said store and the amount of sales made thereof and the terms of such sales, and all moneys received from the sales of such goods manufactured and to be manufactured under this contract of co-partnership to be received and held by said Rawson and Moore in bank for the benefit of said firm, for and during the co-partnership and to be used only for the firm's business from time to time and within the provisions of this co-partnership and within the limits and purposes thereof, said books to be open to the inspection of all parties to this co-partnership, both in Worcester and Boston.

"9th. This firm shall be dissolved at the expiration of any year hereafter (within the three years aforesaid) by the written consent and wish of any three members of said firm by giving notice of such consent or wish in writing at such termination of any such year to each of the members hereof; in case of such a dissolution of this firm, the lease given by D. G. Rawson, of the Boot Factory at Worcester shall terminate. The stock and tools and machinery in bill or schedule marked 'A' is and shall be taken to account by said firm as cash capital to the amount thereof as reflected therein."

[Here followed the attesting clause with the signatures and seals of the parties and the signatures of witnesses.]

*G. R. Swasey, (M. J. Dwyer with him,) for the plaintiff.*

*J. B. Warner, for the defendants.*

BRALEY, J. Between March 14, 1872, the time when the bill was filed and the coming in of the master's report, this case has been pending before the court for more than thirty years. Those originally connected with it, either as counsel, or appointed as masters to hear the parties on the issues to be tried, have been removed by death. A part of the pleadings have been either lost or destroyed, and the books of account of the partnership, kept at the office in Boston, and showing all its business transactions, were damaged almost to the point of destruction, by the great fire of November, 1872. The defendant, Daniel G. Rawson, the only member of the partnership who was familiar with the business of the firm and the contents of the books, became insane, and died, without ever having given his evidence in the case. And the bookkeeper, who knew of its business transactions as shown by the books of account kept by him, also died before his testimony was taken. The masters to whom from time to time the case had been referred did not live to make any report, though in one instance all the evidence had been submitted and arguments made.

In the beginning, the plaintiff asked for the usual accounting arising upon the dissolution of the partnership, but as the case proceeded, it broadened into an additional demand for actual profits received by the defendants from the use of his capital after dissolution. But no supplemental bill was filed, the defendants conceding that the plaintiff might have under the

original bill equitable relief commensurate with his claims, subject, however, to any defence that they might interpose.

On January 25, 1897, the case was again referred to a master, and his report as amended and confirmed by an interlocutory decree of February 20, 1908, together with all questions of law raised and stated, either in the report or open under the decree, have been reserved for our decision.

It is plain from this brief recital of the history of the course of litigation, that in any attempt now made to determine the questions raised, many obstacles would be found, and embarrassments arise, not only by the death of witnesses, but from the absence of important evidence, which had perished, without any fault of the parties. But out of such testimony as could be found, and presented, the master has succeeded in making certain findings of fact, and in stating the rights of the parties, in a full and clear report. Though the plaintiff took a very large number of exceptions, it does not become necessary to take them up in detail, as they may be grouped, and considered under the classification presented in the report and at the argument.

Before considering them, it becomes necessary to ascertain the plaintiff's legal standing, and his right to demand and receive an accounting from the defendants.

The contract of partnership signed by the parties, dated January 1, 1870, was formed "for the purpose of the manufacture and sale of boots and shoes," and among other stipulations provided that "this firm shall be dissolved at the expiration of any year hereafter (within the term of three years aforesaid) by the written consent and wish of any three members of said firm by giving notice of such consent or wish in writing at such termination of any such year to each of the members hereof."

Dissatisfaction over the conduct of the business by the plaintiff appears to have arisen between him and Daniel G. Rawson, and after a dispute over the affairs of the firm, on December 20, 1871, notice was given to the plaintiff by his partners, Daniel G. Rawson, W. B. Fay and C. S. Goddard, of their intention to terminate the partnership at the expiration of the year 1871, as provided in the agreement.

The master finds, and reports, that under ordinary conditions the dissolution took place, and the account should be stated, as

at the close of business December 31, 1871, "but the destruction of the chief books of account by fire, the death of parties and witnesses . . . make it impossible to state an accurate account as of December 31, 1871. The master has endeavored, therefore, to state the account as of December 20, 1871. This was the date of the firm's annual stock taking." No exception is taken to this ruling, and it must be treated as having been accepted by the parties.

Upon all the evidence before him, the master finds, and reports, that at that time the amount due the plaintiff, exclusive of good will, upon a winding up and settlement of the affairs of the firm, was \$13,529.58. As the defendants took no exceptions to the report, this finding must be considered acceptable to them, and of this sum they paid into court for the use of the plaintiff December 27, 1873, the amount of \$12,848.63.

It is the contention of the plaintiff that this sum should be increased by the value of his interest in the good will of the business, and also by the addition of profits which accrued subsequently on his share of the assets in their use by the defendants.

Before the formation of the partnership, the defendant, Daniel G. Rawson, was a manufacturer of boots and shoes, and carried on business under the name of "D. G. Rawson & Co.," with a factory at Worcester and an office in Boston. In the articles of partnership it was stipulated that the place of business, as well as the name and style of the firm, should be the same, and by force of the agreement, if there was any property in the trade name, it passed to the firm without being distinctly enumerated. *Sohier v. Johnson*, 111 Mass. 238, 242. *Whitcomb v. Converse*, 119 Mass. 88, 48. *Boon v. Moss*, 70 N. Y. 470, 473.

After the dissolution by the enforced withdrawal of Moore, no change was made, but the defendants continued the business as before, until December 31, 1872, when a new partnership was formed, consisting of four persons; three of whom were the retiring partners of the old firm and the defendants in this case. No change, however, was then made either in the firm name, which continued to be that of "D. G. Rawson & Co.," or in the place where the business was located, and the defendants took over the assets of the old firm, not for the purpose of liqui-

dation, but for use in their business. And the customers who had patronized the first, continued to trade with them and the second partnership.

The plaintiff retired, not only from the firm, but also from the business that it carried on, while the defendants retained the old place of business, and conducted it under the old firm name.

In other words, no change apparent or real was made in an enterprise which was transferred bodily from the old partnership to the new, except that one partner was obliged to retire under the terms of the old contract, and after a short period, by a new agreement, another was taken in his place.

The attitude of the defendants up to the time of the payment of the money into court was evidently that of a general denial of any right of the plaintiff to an accounting.

Their conduct and motives in dissolving the firm are stated in their second answer, in the words, "and they did so by reason of the incapacity, inattention and inefficiency of the plaintiff in the affairs of the firm, and these defendants found it necessary for the safety and interests of the firm to close the partnership."

No evidence was introduced to support this allegation, and the master reports, that "up to the time of dissolution the plaintiff had devoted himself faithfully to the business of the firm," and during its existence he had sold substantially "eighty-five per cent" of all goods made by it, and "had a very substantial influence in building up the established list of customers."

A trading partnership that had apparently achieved this large measure of success in its business, an appreciable part of which was due to the skill and ability of the plaintiff, might have a good will that upon dissolution would form a valuable part of its assets; and the plaintiff now contends that such good will existed, and that his interest therein is to be valued and added to his share of the assets already found.

When he demanded that his share in the assets of the firm should be paid over, it was not necessary for him to specify the various items that made up the property of the partnership in which he claimed his rights as a partner, in order to save himself from the possible defence of having waived any claim that there was a good will to the business.

At the dissolution the interest of the partners in the assets of the firm became several, and subject only to the payment of the debts of the partnership, and a proper settlement of the accounts between them. *Yale v. Eames*, 1 Met. 486, 487. *Sanborn v. Royce*, 132 Mass. 594, 595. *Pratt v. McGuinness*, 178 Mass. 170. *Bank v. Carrollton Railroad*, 11 Wall. 624.

The general demand made by him was sufficient and broad enough to include its entire property. He was not asked to give a particular enumeration of the various items comprising it, but the attitude of the defendants towards him is well stated in the words of Daniel G. Rawson, who at the interview in which the demand was made "denied that there was anything of value to which the plaintiff had any right." *Hozie v. Chaney*, 143 Mass. 592, 594.

If the defendants had wound up and adjusted the affairs of the partnership by a sale of all of the property, and for the accomplishment of this result they had sold the business as a whole and as designated by the firm name, the good will would have passed, and they must have accounted to the plaintiff for its value. *Musselman's appeal*, 62 Penn. St. 81. *Boon v. Moss*, 70 N. Y. 470.

It is strongly argued by the defendants that the good will cannot be found to have any salable value, and it was not an asset, since the purchaser could not have used the firm name without the consent in writing of Daniel G. Rawson. Gen. Sts. c. 56, § 3. *Lodge v. Weld*, 139 Mass. 499. But no such question arises in this case, for by their conduct in forcibly and wrongfully appropriating to their own use the property of which the good will was a part, they have put themselves in a situation similar to that which would have arisen on a sale of it, either to themselves or by them to a stranger. *Jones v. Dexter*, 130 Mass. 380. *Mellersh v. Keen*, 27 Beav. 236; *S. C.* 28 Beav. 453. See *Burchell v. Wilde*, [1900] 1 Ch. 551.

It is not possible, on the facts of this case, to direct the master to put up and sell by auction the good will, and it does not become necessary to consider whether the plaintiff at any time could have had its value determined in this way. *Hutchinson v. Nay*, 183 Mass. 355.

While no rule can be laid down by which the good will of a

trading partnership in all cases can be ascertained and its value fixed with mathematical precision and accuracy, yet if it be assumed that a firm has been in existence for a time long enough to establish a business sufficiently permanent in character to include not only its customers but the incidents of locality and a distinctive name, these advantages constitute a going business enterprise; and it may then be said that the name and what is done under it go together; and a good will exists which forms an asset of commercial value in a winding up between partners.

The fact that such an asset may be difficult of appraisement is no legal reason for denying to the retiring partner an appraisal, if it be proved that he is entitled to it. *McMurtrie v. Guiler*, 183 Mass. 451, 454, and cases cited.

And there seems in this case to have been at least sufficient evidence before the master from which he could find and determine not only the fact of its existence, but also the amount to be allowed to the plaintiff for his share in the good will of the firm of "D. G. Rawson & Co." at the date of dissolution.

The length of time the firm had been in existence, the nature and character of its business, the fact whether it had been successful or unsuccessful, the average amount of net profits, the probability of the continuance of the business under the same name without competition in any form from a retiring partner, are some of the elements that may enter into such an inquiry.

As the trial proceeded before the different masters, at some stage of the proceedings it appeared that the defendants had used the share of the plaintiff, including not only the first amount found by the master, but that amount increased by the value of his interest in the good will in their business, and under the stipulation which was treated by the parties as a substitute for a supplemental bill, he now contends that this share is to be increased by actual profits, and added to the sums already ascertained in finding the total amount that is due to him.

From the date of dissolution, January 1, 1872, to December 27, 1878, the share of the plaintiff in the assets of the firm which had been dissolved was used by the defendants in their business; and it makes no difference in this case, in the measure of their accountability to him, whether this period of time is divided into the part in which they continued the business between them-



selves and that after the new partnership was formed, for during the entire time they used his share as a portion of their working capital.

The conduct of the defendants, and the use by them of the plaintiff's property, placed them in a fiduciary relation to him, in the care and management of his share, until they had fully wound up and settled its affairs. *Jones v. Dexter*, 180 Mass. 380. *Knox v. Gye*, L. R. 5 H. L. 656.

They were called upon to act fairly and in good faith, and to use reasonable diligence in seeing that his interests were fully protected; and if they chose to use his property without his consent, they must strictly account for any and all actual profits received by them from such use. *Dunlap v. Watson*, 124 Mass. 305, 307. *Freeman v. Freeman*, 136 Mass. 260, 264.

The rule has sometimes been stated, that owing to the great difficulty which may arise in determining the amount of subsequent profits, and stating the account between those who are entitled to share them, liquidating or surviving partners who continue to use the capital of a retiring or deceased partner ought not to be held liable for profits on capital used, except in cases of gross fraud or breach of trust. See *Phillips v. Reeder*, 3 C. E. Green, 95.

But it was said by this court in *Robinson v. Simmons*, 146 Mass. 167, 175, that "as a general rule, where a surviving partner continues to use the capital of a deceased partner in the business, the representatives of the latter, in the absence of any agreement to the contrary, have the election to demand either interest on the capital used or the profits earned by its use, the latter being accretions to the fund owned by them. There is, however, no inflexible rule governing all cases, but each case depends upon its own circumstances and equities."

Though this language was used with reference to the right of the representatives of a deceased partner to such an accounting, no sufficient reason appears why it does not apply equally to a case where the dissolution is not caused by death, but takes place under the terms of the articles of partnership.

When the plaintiff demanded an accounting, and that his share of the assets should be ascertained and paid to him, the demand was met with a denial of such a right, and a refusal to

grant his request. He was obliged to resort to a bill in equity to compel the defendants to do what by implication under their contract, which contained no provisions for a settlement of the partnership on its termination, they had agreed to perform upon a dissolution of the firm at their option; and after which, with the plaintiff's assent, they became bound within a reasonable time to wind up and settle the affairs of the partnership, and pay him his proportionate part.

No pretence was made by them that in good faith they had taken the partnership property at a fair valuation, and were ready to state the account on that basis, but they refused to pay anything, absolutely ignored him, and treated the property as their own. For this reason, the case does not fall within the decision made in *Denholm v. McKay*, 148 Mass. 434, relied on by the defendants.

From the facts found by the master, the defendants must have known that the profits of the business had been large, and that the plaintiff was entitled to one third of them under the partnership articles upon dissolution; or, at the latest, after a reasonable time had elapsed in which to reduce the assets to cash, if they assumed to act as partners in liquidation.

Apparently, they could have paid the plaintiff as early as August 31, 1872, but they made no offer of any specific sum until the payment into court, and then the amount offered was less than that actually found to be due to him.

Upon the dissolution of a partnership, in the absence of any agreement permitting him to charge for his services, the partner who winds up the business and disposes of the assets ordinarily is not allowed compensation. What he does is as much for his own benefit as for that of the retiring or the estate of a deceased partner; and it may be said that this is one of the burdens which may arise, and is deemed incidental to the contract. If, however, the continuation of the business is consented to by those entitled to an account, then he is to be compensated for any extra services. *Schenkl v. Dana*, 118 Mass. 236.

While it must be held under the facts disclosed in this case that there was no such assent by the plaintiff to the use of his money as will bring it within the line of decisions, where upon dissolution the liquidating or surviving partner continues the

business, and by consent uses the share of the retiring or deceased partner, and the situation of the defendants thus becomes analogous to that of trustees in their own wrong, yet the plaintiff cannot have compensation both by way of profits actually earned by his money, and at the same time interest on his capital. *Robinson v. Simmons, ubi supra. Levi v. Karrick*, 13 Iowa, 344.

When the contract of partnership terminated, he was then to have his share as it stood at dissolution; but if without his consent the defendants used his capital, they must at his election give to him what, if anything, it had earned, or allow interest for its use. If any depreciation in the value of the assets taken over by them is found during the short period covered by the accounting, such decrease may be allowed so far as it can properly be considered in finding the amount of net profits. It is obvious that what would be just in one case might not be in another.

He must now take one of two positions, either that the defendants in their relation to him had been guilty of bad faith and a breach of their trust, and must account not only for the principal, but for all profits received by them by the wrongful use of his money, which is the measure of their liability, or he must be content with accepting interest in full satisfaction for the use of his principal. *Robinson v. Simmons, ubi supra.*

The use by the defendants of the property of the plaintiff after August 31, 1872, which is the date found by the master when the share of the partners in the assets of the partnership could have been liquidated and paid, was unauthorized. But whether under such conditions they should be allowed anything for their skill and services is within the discretion and control of the court, and does not rest on any contract made by the parties. *Robinson v. Simmons, ubi supra. Turnbull v. Pomeroy*, 140 Mass. 117. *Thayer v. Badger*, 171 Mass. 279, 280.

It does not appear that the nature of the business presented any extraordinary difficulties, or called for more than ordinary business skill or ability, though as a result of its continuance large profits appear to have been realized. The defendants apparently kept in successful operation the business enterprise of which they had taken possession at the dissolution of the firm.

And to this extent it may be found that the subsequent profits can be said to be due to their efforts.

In finding the net profits, the master has allowed eight per cent by way of interest on capital and profits invested as capital by the defendants, but he does not state whether he finds that the sums which each of them would thus receive should be treated as equivalent to that part of the net profits due to their skill and services. If so, the balance remaining would not be subject to any further reduction, but should be considered as the actual earnings of the whole capital invested, including the amount due to the plaintiff.

It may be assumed that the master regarded the contract of partnership as still controlling the rights of the parties; but if interest at the date of dissolution should be allowed on the original capital invested, after dissolution, interest ought not to be charged until the balance has been found on a settlement between the parties, and a reasonable time has passed in which to wind up the affairs of the firm. *Crabtree v. Randall*, 133 Mass. 552. *Bradley v. Brigham*, 137 Mass. 545, 546.

If, however, the defendants were entitled to be further allowed such part of the net profits, as the master upon the evidence before him might find to be just and equitable, then in order to give the plaintiff equality of participation, interest at the same rate for like periods of time after August 31, 1872, would have to be reckoned not only upon his principal, but also upon that principal as augmented for each period by his share of the actual profits when found.

In order to avoid what might become a long and complex, if not impossible, statement of the accounts, the same result is substantially reached, and the plaintiff may have the net profits stand, without diminution by any credit of interest on the total capital and profits which have been invested in the business. From the net profits so stated, such a sum is to be deducted as the master finds is solely attributable to the skill and services of the defendants, and the balance is to be treated as actual profits, in which the whole capital invested is entitled to share equally. This method of determining the share of each of the parties interested allows to the defendants the amount actually earned by their capital; and if it be said they lose interest, the reply is,

not only that the original contract is not to control, which provided for interest at the rate of eight per cent on the capital invested during the life of the partnership, but the plaintiff also gets no interest upon his share, which they have used against his will and in their own wrong. *Dunlap v. Watson*, 124 Mass. 305. An allowance to them of so much of the net profits as may be found due to their skill and ability is all that they are equitably entitled to receive.

The plaintiff, therefore, after August 31, 1872, is to be allowed such proportion of the actual profits as his amount of capital bears to the whole capital invested. *Freeman v. Freeman*, 142 Mass. 98, 106. *Dunlap v. Watson*, *ubi supra*. *Hartman v. Woehr*, 3 C. E. Green, 383, 386. *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

The result to which we have come may be stated as follows: the sum of \$13,529.58 is to be treated as a constant factor in the problem of ascertaining the final amount due to the plaintiff; there is to be added to it the value of his interest in the good will of the firm at the date of dissolution, and the total amount represents his share in the assets of the partnership. This amount is to be further increased by the plaintiff's part of the actual profits accruing to him from the use of his money or share after August 31, 1872, and up to December 27, 1873. From the principal so found the partial payment of \$12,843.63 is to be deducted, and on the new principal interest is to be computed at the rate of six per cent from December 27, 1873, to the date of the entry of the final decree.

The case must be recommitted to the master to make the necessary computations and findings, and state the result in a final report.

*Decree for the plaintiff accordingly.*

JEREMIAH CROWLEY vs. FITCHBURG AND LEOMINSTER  
STREET RAILWAY COMPANY.

185	279
188	538

Worcester. September 29, 1903. — March 2, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Street Railway.*

( A rule of a street railway company, operating two connecting lines of railway, requiring a passenger changing from one line to the other to produce a transfer or pay his fare on the line to which he has changed, is a reasonable rule, which is binding on a passenger to whom it is known.

A rule of a street railway company, requiring a passenger changing from one of its lines to another to produce a transfer or to pay his fare on the line to which he has changed, cannot be waived by the conductor of the car from which the passenger has come or by the conductor of the car to which he has changed.)

*Semble*, that it is not within the scope of the employment of the conductor of a street railway car, without express authority, to procure the arrest of a passenger on his car, for alleged violation of Pub. Sta. c. 112, § 197, (R. L. c. 111, § 251,) in fraudulently evading the payment of a fare, or to make a complaint against him before a magistrate for this offence.

MORTON, J. This is an action of tort to recover damages for an assault, and for a false and malicious arrest and imprisonment. The defendant operates two connecting lines of street railway on Main and Water Streets in Fitchburg. A passenger paying his fare on one is entitled to a transfer taking him to his place of destination on the other. But if he changes from one line to the other the rules of the company require him either to produce a transfer or in default thereof to pay fare. The plaintiff lived on Water Street and got on to a Main Street car to go to his home, changing cars at a place called Depot Square. He offered a twenty dollar bill in payment of his fare. The conductor was unable to change it but told him that he would change it when he got to Depot Square, and did, taking out the fare. The Water Street car was waiting and the conductor of that car shouted to the plaintiff to "hurry up." The plaintiff turned to the conductor of the Main Street car and asked for a transfer, but the conductor said "Never mind your transfer," and shouted to the conductor of the Water Street car, who was about twenty feet away, to pass the plaintiff, that he was all right and

had paid his fare, and he (the conductor) had not time to give him a transfer. The plaintiff got upon the Water Street car, and an altercation took place between him and the conductor in regard to the payment of his fare. The conductor demanded payment of fare and the defendant refused, saying that he had paid it. The conductor took hold of him by the arm to eject him but desisted on a threat of resistance by the plaintiff. The plaintiff did not pay his fare or produce a transfer, and the conductor called upon a policeman to arrest the plaintiff which he did and took him to the police station where he was admitted to bail. The next morning the conductor made a complaint against the plaintiff, but when the case was called the plaintiff was discharged, no evidence being offered.

The plaintiff offered to show that he had a conversation with one Sargent the superintendent of the defendant company relative to the prosecution of the complaint by the railroad company. There was no statement, if that is material, as to what the conversation was, or what the plaintiff expected to prove by it, and there was no evidence as to the authority of the superintendent except such as might be inferred from the fact that he was superintendent. This offer as well as an offer to show that an officer and employee of the company asked for a continuance of the hearing upon the complaint were excluded and the plaintiff duly excepted. At the close of the evidence the judge directed a verdict for the defendant, and the case is here on exceptions by the plaintiff to this ruling and the rulings in regard to the evidence offered by the plaintiff and excluded.

We think that the rulings were right. The rule that a passenger changing from one line to the other should produce a transfer or pay his fare on the line to which he changed was a reasonable rule and was known to the plaintiff. *Bradshaw v. South Boston Railroad*, 135 Mass. 407. The conductor had no right to waive it or disregard it, and the plaintiff not having paid his fare on the Water Street line or produced a transfer from the Main Street line the conductor was acting within his rights and in the performance of his duty in attempting to eject the plaintiff from the car, and was not guilty of an assault in taking hold of the plaintiff's arm for that purpose. It is immaterial whether the conductor of the Water Street car heard what was said to

him by the conductor of the Main Street car or not. If he did hear it, it was said to him by a conductor whose right to disregard the rules was, so far as appears, no greater than his own, and it gave the conductor of the Water Street car no right to carry the plaintiff without the production of a transfer or the payment, in default thereof, of a fare.

There is nothing to show that it came within the scope of the duty of the conductor of the Water Street car to make a complaint against the plaintiff, or to cause his arrest and detention. But if it had been within the scope of his duty, or if what he did had been ratified and confirmed by the defendant, the arrest and detention were clearly justified, and therefore the plaintiff was not harmed by the exclusion of the testimony that was offered. R. L. c. 111, § 251. *Commonwealth v. Jones*, 174 Mass. 401. *Dixon v. New England Railroad*, 179 Mass. 242, 247. The plaintiff knew that the rules of the road required the production of a transfer or the payment of a fare, and it was an evasion of fare within the meaning of the statute to ride, or attempt to ride, without producing a transfer or paying the fare required in default thereof. *Commonwealth v. Jones* and *Dixon v. New England Railroad*, *ubi supra*.

*Exceptions overruled.*

*J. E. McConnell*, for the plaintiff.

*W. P. Hall*, for the defendant.

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### COMMONWEALTH vs. BOSTON TERMINAL COMPANY.

Suffolk. November 12, 1903. — March 3, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Commonwealth. Boston Terminal Company.*

The Commonwealth, where it has not parted with its title, owns the soil under navigable waters within a marine league from extreme low water mark.

By St. 1896, c. 516, providing for a south union station in Boston, the Legislature neither expressly nor by implication granted to the Boston Terminal Company any part of the land of the Commonwealth under navigable waters, but gave that company the right to take in fee by right of eminent domain such portions

185	281
187	505
185	281
192	113
192	2115
185	281
194	298



of the land of the Commonwealth as were needed for the station and its approaches. Therefore the Commonwealth was entitled to recover from the terminal company under the terms of the act compensation for the land so taken. The fact that § 14 of the act required the terminal company without compensation to convey to the city of Boston for the location of Dorchester Avenue and Summer Street nearly one half of the land so taken, does not affect this conclusion, as this was an express condition imposed by the Legislature to which the company agreed by accepting the act.

PETITION, filed January 4, 1898, for the assessment of damages for lands of the Commonwealth lying below extreme low water mark, taken in fee by the respondent under St. 1896, c. 516.

In the Superior Court the case was heard by *Hardy, J.* upon the petition, a demurrer and agreed facts. The judge overruled the demurrer, and, at the request of the parties, being of opinion that the questions involved ought to be determined by this court before any further proceedings in the Superior Court, reported the case for such determination.

*F. H. Nash*, Assistant Attorney General, (*R. G. Dodge*, Assistant Attorney General, with him,) for the Commonwealth.

*S. Hoar & W. Hudson*, for the respondent.

BRALEY, J. It must now be taken as settled that the territorial limits of the Commonwealth extend one marine league from its seashore at the line of extreme low water, and the title to the land within these boundaries, except as it may have been granted to others or acquired by them previously to St. 1867, c. 275, by prescription is vested in the State. St. 1859, c. 289. Gen. Sts. c. 1, § 1. Pub. Sts. c. 1, § 1. *Dunham v. Lamphere*, 3 Gray, 268, 270. *Wonson v. Wonson*, 14 Allen, 71, 82. *Nichols v. Boston*, 98 Mass. 39. *Commonwealth v. Manchester*, 152 Mass. 230, 240. *Attorney General v. Revere Copper Co.* 152 Mass. 444, 450. *Manchester v. Massachusetts*, 139 U. S. 240.

In its sovereignty it represents not only the proprietary right formerly held by the king, and which at the Revolution was in the Colony, and then passed by succession to the State, but it also became vested by the same event, with jurisdiction and dominion over the common right of the people at large to the free use of such tidal waters for fishing and navigation. *Barker v. Bates*, 18 Pick. 255, 259. *Dill v. Wareham*, 7 Met. 438.

*Drake v. Curtis*, 1 Cush. 395, 413. *Commonwealth v. Alger*, 7 Cush. 53, 58. *Commonwealth v. Hilton*, 174 Mass. 29, 30. *McCready v. Virginia*, 94 U. S. 391.

Whatever may have been the rights of the crown under the early common law, the king could not in recent times sell his proprietary interest in lands covered by such waters so as to deprive his subjects of these rights. *Weston v. Sampson*, 8 Cush. 347, 349, 351. *Attorney General v. Parmeter*, 10 Price, 378. *Parmeter v. Attorney General*, 10 Price, 412. *Gann v. Whittable Free Fishers*, 11 H. L. Cas. 192, 217.

In this country the decisions of the courts of the several States as to the right of the State to divest itself of its trusteeship have not been uniform. The cases are collected and exhaustively reviewed and the principle discussed by Gray, J. in *Shively v. Bowlby*, 152 U. S. 1, 26.

But the common law of this State, whatever the rule may have been in other jurisdictions, has not recognized this limitation as binding on the Legislature, to whom is given the control of all public rights.

Originally, and before the ordinance of 1647, the title of the Colony included flats between high and low water mark. By that ordinance these flats not previously granted to individuals or appropriated to public uses became the property of the owner of the adjoining upland "where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further." *Wonson v. Wonson*, *ubi supra*. The ordinance left unaffected the remainder of the public domain below the line established, and within the limit subsequently defined as a marine league therefrom.

The title or proprietary right is to the soil itself, not to the water that may cover it, either for a part or all of the time. That is, the sovereign power, having the absolute right to terminate the trust which is appurtenant to its ownership, can refuse to act longer as trustee, and convey its property, so that the grantee will hold it free from the trust, *Boston v. Richardson*, 105 Mass. 351, 356, 362, 363, *Henry v. Newburyport*, 149 Mass. 582, 585, *Martin v. Waddell*, 16 Pet. 367, 410, *McCready v. Virginia*, *ubi supra*, and being vested with both rights can by way of grant pass its interest by an act of the Legislature in

lands that are below extreme low water mark, and which when filled by the grantee will extinguish the right of user by the public. *Boston & Hingham Steamboat Co. v. Munson*, 117 Mass. 34. *Attorney General v. Gardiner*, 117 Mass. 492, 499. *Drury v. Midland Railroad*, 127 Mass. 571, 583, and note. *Hastings v. Grimshaw*, 153 Mass. 497. See Resolves 1856, c. 76; St. 1860, c. 200.

Though for the purposes of protection of the seashore, and securing to all of its citizens the right and benefit of unobstructed navigation of tidal waters, notwithstanding such grant, it may require the grantee to obtain its license or permission to wharf or to fill before such waters can be displaced by any structure or filling. St. 1866, c. 149. Pub. Sta. c. 19, § 8. *Attorney General v. Boston & Lowell Railroad*, 118 Mass. 345, 348. *Attorney General v. Cambridge*, 119 Mass. 518. See also in this connection *Lake Shore & Michigan Southern Railway v. Ohio*, 165 U. S. 365; *Cummings v. Chicago*, 188 U. S. 410; *Montgomery v. Portland*, 190 U. S. 89.

The Commonwealth, then, must be held to have had a right of property in and title to the several parcels of land described in the petition, and all situated below the line of extreme low water. By the demurrer the respondent admits that it has taken this land by force of and in accordance with the provisions of St. 1896, c. 516.

The Boston Terminal Company was organized under this act to build and maintain a union passenger station in the southerly part of the city of Boston, and to provide and operate adequate terminal facilities for the various railroad companies named therein which, upon completion of the station, are required to occupy and use it.

Its capital stock amounting to \$500,000 in the proportion of one fifth to each, could be subscribed for and held by these various corporations, and "all said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act," so that in this way the money estimated to be necessary to pay for the land to be taken for the site of the proposed station and its approaches would be paid in before the work was begun. The immediate government, direction and control of its affairs were vested in

a board of five trustees, one of whom was to be appointed by each of the five railroad companies.

Instead of the railroad companies themselves uniting to build the station, the history of the statute indicates that it was apparently deemed best that the several persons named as incorporators should organize a corporation for this purpose.

It was a plan undertaken in this form by those connected with or interested in the railroads to be benefited, and it is too plain for discussion that, standing by itself, it would be financially unprofitable and must fail of success, and though possessing a distinct and independent corporate existence the respondent must be treated as a company created and organized as an auxiliary to the railroads. *Frazier v. New York, New Haven, & Hartford Railroad*, 180 Mass. 427.

There is nothing in the act by which it was compelled to begin, go forward and complete this work, but it may fairly be inferred and conceded that if once commenced, then the plan was to be carried out according to the specified details, and to this extent it may be said to be mandatory. *Bradford v. Old Colony Railroad*, 181 Mass. 33, 35.

But not rigidly so, for the language used as to the taking of land to change the streets is permissive. A certain amount of flexibility at least was left, so that if the whole territory named was not necessary, or if the combination of the parts, to make up the whole, could be better adjusted by changes, such changes were permissible. If it be granted that the taking of the land for Dorchester Avenue and Summer Street and for the station itself must have necessarily included the lands described in the petition, yet it was open to the respondent, if it did not want to pay for what it must take, either to abandon its project or petition for a change in the act.

Under these conditions it was within the power of the Legislature to determine in the first instance if the enterprise for whose benefit private property was to be appropriated was of such a character that the purpose of the respondent constituted a public use of the land, and the State might permit a part of its domain to be taken for such a use in fee, or a less interest therein without compensation, but such a grant must be made by a legislative act. *Talbot v. Hudson*, 16 Gray, 417. This

brings us to the main contention of the respondent, that here such a grant should be inferred, because the land after it was taken still remained subject to a public easement, nearly one half in area being used for public ways known as Dorchester Avenue and Summer Street, and the remainder for the station itself. *Prince v. Crocker*, 166 Mass. 347, 361. And though the nature of the user by the public had changed from that of rights in navigable waters to those of reasonable facilities of access to and transportation as passengers on railroads that were common carriers, and into legally created highways for public travel, yet the easement in each instance was for the benefit of the public, and it must therefore have been intended that the latter easement should be taken and deemed to be a fair equivalent or set-off for the other, and it ought not to be held to pay for the land so taken.

In taking the land authorized by the statute a title in fee was to be acquired, either by purchase from the owners or by the exercise of the right of eminent domain. This right could not under the Constitution have been legally given to the respondent, if it were not for the principle that land held by railroads, whether within the location necessary for the placing of tracks or to afford access to them, is considered subjected to a public use. *Talbot v. Hudson* and *Prince v. Crocker*, *ubi supra*.

But if a fee is taken, the title is not wholly within the control of the State, for when the public use ceases, then land so held is the private property of the taker, discharged from the easement. *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 512, and authorities cited.

There is no doubt that the title of the respondent in this case must be measured by the extent of the taking, which was in fee, and not of a mere easement; and the strength of the argument is weakened by this fact, that instead of relying on the construction now put forward, that a fee was granted by implication, and if so, then the title passed absolutely by force of the act and nothing further was necessary, it preferred to acquire and hold the land through the delegated right of eminent domain.

“And if there is such a thing as a new title known to the

law, one founded upon a taking by the right of eminent domain is as clear an example as can be found." Holmes, C. J. in *Emery v. Boston Terminal Co.* 178 Mass. 172, 184.

If it be said that under § 14 the respondent was required to convey subsequently without compensation to the city of Boston so much of the real estate described in the petition that is now within the lay out and location of Dorchester Avenue and Summer Street, and that it could not be compelled to part title to its property without compensation even if the use was in part for the benefit of the public, the principal question involved is not affected, for the reason that the respondent was not obliged to accept the act, but if it did, then it must be held to have assented to this condition. *Hampshire v. Franklin*, 16 Mass. 76, 87.

While it is true that the people who use the facilities for travel from place to place furnished by the railroad companies occupying the terminal station, which in a broad sense can be held to include not only the building, but all the appurtenances that make it accessible and usable, are benefited, yet the railroads share in the benefit, and the nature of the undertaking itself from whatever point of view remains unchanged.

The respondent must accept the burdens while receiving the benefits. And the statute is to be construed as a legislative act by which the respondent was enabled to complete its scheme of a terminal station for pecuniary profit, though it was required to contribute a part of its property to another public use, made necessary solely to enable it to carry out its purpose.

It cannot be held that the State, any more than an individual, parts with title in fee to real estate by implication alone; and if its land is to be granted in aid of a private corporation, even if the public may thereby be more largely accommodated, this intention must clearly appear by the express words of the act under which the grant is claimed. *Commonwealth v. Roxbury*, 9 Gray, 451. *Commissioners on Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 467. *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361, 365. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

There is no doubt that where the precise wording of a statute is such that, if exactly carried out, the result would not

be what the Legislature intended, the literal language used may be rejected; but here the real design or object to be effected is precisely and clearly expressed, and the words used must therefore be given their ordinary meaning and construction, and which will carry that design into effect.

Though in taking the lands prescribed by the terms of the act it would be obliged to acquire those of the Commonwealth included in such description, no intention appears to give this property to the respondent, or to grant the right to acquire title upon conditions other than those by which it was authorized to purchase or take land belonging to others. The authority to take, and the requirement of compensation to be paid for what is taken, go together, and are expressed in the same language as to both classes of owners. *Commonwealth v. Boston & Maine Railroad*, 3 Cush. 25. *Old Colony & Fall River Railroad v. Plymouth County*, 14 Gray, 155, 161 *ad finem*. *Grand Junction Railroad & Depot Co. v. County Commissioners*, 14 Gray, 553, 565. *Boston & Albany Railroad v. Cambridge*, 159 Mass. 283, 285, and cases cited.

The ruling of the Superior Court was right, and the order overruling the demurrer is affirmed.

*So ordered.*

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BERNARD F. KELLEY, executor & trustee, vs. BENJAMIN F. SNOW & others.

Bristol. October 26, 1903. — March 9, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Husband and Wife. Gift. Trust. Power. Savings Bank. Will.*

A married woman may make a present conveyance of all her personal property to a trustee, retaining a beneficial interest during her life, with a gift over upon her death, subject to be varied by appointment during her lifetime upon giving notice in writing to the trustee, and such a conveyance is not invalid if made for the purpose of preventing the husband of the donor from sharing in the distribution of the property upon her death.

A trust created by a married woman by an instrument under seal, executed in duplicate, conveying the personal property of the donor to a trustee, the donor retaining a beneficial interest during her life, with a gift over upon her death,

is not terminated by the trustee, after keeping his duplicate original of the instrument for two years, returning it to the donor at her request.

If a married woman makes a present conveyance of personal property to a trustee, retaining a beneficial interest during her life, with a gift over upon her death, subject to be varied by appointment upon giving notice in writing to the trustee, and no mention is made of a power of appointment by will, the power can be exercised only during the lifetime of the donor, and an attempted revocation of the trust by will is void.

Whether a deposit of money in a savings bank, in which the depositor already has deposits, stated to be in trust for another person, creates a trust for the benefit of that person, depends on the intent of the depositor and is a question of fact.

The consent in writing by a husband to a will of his wife leaving him a certain sum of money does not operate as a consent to the will as modified by a subsequent codicil, which does not change the legacy to the husband but radically changes the rest of the will, and in such a case the husband can waive the provision of the will for his benefit and require his statutory share.

**BILL IN EQUITY**, filed December 31, 1902, by Bernard F. Kelley, executor under the will of Mary Ann Snow, late of New Bedford, and also trustee of certain funds and personal property assigned and transferred to him by Mary Ann Snow in her lifetime, for instructions.

The case came on to be heard before *Knowlton*, C. J., who, by agreement of the parties, reserved it for determination by the full court.

The will and first codicil of Mary Ann Snow were as follows :

"Know all men by these presents that I, Mary Ann Snow, of New Bedford, Bristol County, Massachusetts, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament.

"First. I order my executor hereinafter named as soon as convenient after my decease to sell all my property, real, personal or mixed, and I hereby authorize and appoint my said executor to sell said property, both real and personal, either at private sale or public auction, and to make, execute and deliver all deeds, bills of sale or other instruments necessary to carry such sales into effect.

"Second. After the payment of all my debts, funeral expenses and the charges of administration, and the amount to which my husband, Benjamin F. Snow, would by law be entitled from the proceeds of said sale, I give and bequeath to Mary Ann Hammond, my niece, the sum of one thousand dollars.

"Third. All the rest, residue and remainder of my estate,



real, personal or mixed, I give, devise and bequeath to Thomas R. Hillman in trust, nevertheless, for the following trust purposes only, viz: to keep the same safely invested and to pay over the income therefrom to Gracie Kirwin for and during the term of her natural life. At her death I direct my said trustee to pay over said trust fund, together with all accumulations of interest to the issue of said Gracie Kirwin if she die leaving issue surviving her. If the said Gracie should die leaving no issue surviving her I direct my said trustee to pay over said trust property in equal shares to Mary Ann Hammond, Thomas Meade, son of my brother, John Meade, and Bernard Kelly.

"Fourth. I nominate and appoint Thomas R. Hillman as executor of this will and request that he be not required, either as executor or trustee under this will, to furnish surety or sureties on his official bond.

"In witness whereof I have hereunto set my hand this twenty-third day of June A. D. 1892. Mary <sup>her</sup> × Ann Snow." <sub>mark</sub>

Here followed an attesting clause and the signatures of three witnesses.

"I, Mary Ann Snow make this codicil to my will above executed. I revoke and cancel in the second clause of my will the words, 'And the amount to which my husband, Benjamin F. Snow, would by law be entitled,' and I hereby give and bequeath to my said husband the sum of two thousand dollars, except as herein changed by this codicil I hereby ratify and confirm my said will.

"In witness whereof I hereto set my hand this twenty-third day of June A. D. 1892. Mary <sup>her</sup> × Ann Snow." <sub>mark</sub>

Here followed another attesting clause and the signatures of the same three witnesses. Then came the following signed by the husband of the testatrix:

"I hereby consent to this codicil and the foregoing will as changed by this codicil. Benj. F. Snow."

The second codicil was as follows:

"I, Mary Ann Snow, make this second codicil to my will dated June 23d, 1892.

"I revoke section four of my said will and substitute therefor the following section.

"I nominate and appoint Bernard Kelley of Rochester, New York, executor of the foregoing will and codicil.

"In witness whereof I hereto set my hand this first day of November, A. D. 1893.

Mary <sup>her</sup> × Ann Snow."  
<sub>mark</sub>

Here followed an attesting clause and the signatures of three witnesses.

The third codicil was as follows :

"I, Mary Ann Snow, wife of Benjamin Snow of New Bedford, Bristol County, Massachusetts, make this codicil to my last will in manner following. My will and the codicil thereto are dated June twenty-third 1892, and my husband, Benjamin F. Snow, assented thereto and I hereby ratify and confirm said will and codicil except as herein changed.

"1. My friend Thomas R. Hillman has deceased and I appoint as executor of this will my nephew Bernard Kelly and I request that he be excused from furnishing sureties or a surety on his official bond. He shall have all the power given in said will to Hillman.

"2. The third clause in said will, wherein the rest, residue and remainder of my estate was given in trust to Thomas R. Hillman for the benefit of Gracie Kirwin I hereby cancel and revoke, also the bequests therein given at the end of said third clause to Mary Ann Hammond, Thomas Meade and Bernard Kelly and issue of Grace Kirwin.

"3. Whereas the said Bernard Kelly entered into a trust agreement dated September eleventh, 1893, wherein he agreed upon receipt of eleven savings bank deposits to make certain disposition of the same as in said agreement contained. I do now cancel said disposition and revoke the same and in place thereof substitute the following bequests :

"4. I direct my executor to deposit with the Treasurer of the City of New Bedford the sum of two hundred dollars the income from which shall be used in the care and preservation of my burial lot in Oak Grove Cemetery in New Bedford.

"5. I give and bequeath to Bernard Kelly, my nephew, three thousand dollars.

"6. I give and bequeath to my sister, Elizabeth Kelly, two thousand dollars.

"7. I give and bequeath to my niece, Mary Ann Hammond, the sum of two thousand dollars, one half of my silver, one feather bed, three mats and one set gold band china crockery.

"8. To the following named persons I give and bequeath the sum of one thousand dollars each; Thomas Meade, son of my brother John Meade; John Meade, son of the aforesaid Thomas Meade; Mary Meade, daughter of Thomas and grand-daughter of my brother John Meade; Mary C. Hammond, daughter of said Mary Ann Hammond; Elizabeth E. Hammond, daughter of said Mary Ann Hammond; Herbert Hammond, son of said Mary Ann Hammond; Edward Kelly, son of my sister Elizabeth; William Meade, son of my brother John Meade; William Meade, son of Thomas and grandson of my brother John.

"9. All the rest, residue and remainder of my estate, real, personal or mixed I give, devise and bequeath to the said Mary Ann Hammond.

"In witness whereof I hereto set my hand this twenty-eighth day of June, 1901. Mary <sup>her</sup> × Ann Snow." <sub>mark</sub>

Here followed an attesting clause and the signatures of three witnesses.

The indenture of trust and assignment were as follows:

"Know all men by these presents that I, Mary Ann Snow, of New Bedford, Bristol County, Massachusetts, for a valuable consideration, do hereby assign and transfer unto Bernard F. Kelley, of Rochester, New York State, all my personal property, consisting of my household furniture and furnishings and silver and clothing; and the following deposits in savings banks, viz:

Money on account No. 72,088 New Bedford Institute for Savings.

"	"	80,718	"	"	"
"	"	52,083	"	"	"
"	"	37,335	"	"	"
"	"	44,665	"	"	"
"	"	47,819	"	"	"
"	"	56,762	"	"	"
"	"	79,772	"	"	"
"	"	26,431	"	Five Cents Savings Bank.	
"	"	39,962	"	"	"
"	"	14,261 Plymouth Savings Bank, Plymouth, Mass.			

in trust, nevertheless, for the following trust purposes only and not otherwise, viz:

"First. Said Mary Ann Snow is to retain possession of the property hereby assigned, together with the bank pass books representing said savings bank deposits to collect the income during her life.

"Second. Said Mary Ann Snow shall have the power to change the following dispositions at any time upon written notice to said Kelley.

"Third. At the decease of said Mary Ann Snow, said Kelley shall then take possession of said property and bank books and shall distribute the same as follows, providing the following dispositions have not been changed.

"Fourth. To Mary Ann Hammond, wife of Herbert Hammond, one-half of my silver and one feather bed, three mats and one set gold band china crockery.

"Fifth. To Grace Kirwin, my son's natural child, the remainder of my silver and household furniture and clothing.

"Sixth. I direct my said trustee to deposit with the Treasurer of the City of New Bedford the sum of one hundred dollars, the income from which shall be used in the care and improvement of my burial lot in Oak Grove Cemetery, New Bedford, Mass.

"Seventh. To Norah Meade three hundred dollars.

"Eighth. To Bernard F. Kelley three thousand dollars.

"Ninth. My said trustee shall hold in trust the sum of two thousand dollars, and shall pay the income thereof to said Mary Ann Hammond during her natural life. If her husband shall die during her life said trustee shall thereupon pay to her the whole of said trust fund. At her decease if said fund shall not have been paid to her as aforesaid it shall then be paid to her issue surviving her.

"Tenth. My said trustee shall hold in trust the sum of five hundred dollars, and shall pay the income thereof to my brother James Mead during his life. At his decease said fund shall be paid over to George Mead, son of said James Mead.

"Eleventh. My said trustee shall pay to my sister Elizabeth Kelley the sum of one thousand dollars.

"Twelfth. My trustee shall hold in trust the sum of one thousand dollars, the income thereof to be paid to Thomas Mead, son of my brother John Mead, during his life. At his

death said fund shall be paid to John Mead, son of said Thomas. If said John Mead die before his father, leaving issue surviving him, said fund shall be paid to such issue. If he leave no issue surviving him, it shall be paid to his brothers and sisters who may be living at his father's death.

"Thirteenth. All the rest, residue and remainder of said property, my said trustee shall hold in trust and shall pay the income therefrom to said Grace Kirwin during her life; if it shall be considered expedient by my trustee he may pay to said Grace Kirwin such sums from the principal as he deems best. At her decease said fund or so much as remains shall be paid to the issue of said Grace if she die leaving issue surviving her. If no issue survive her said fund shall be paid to the issue of Elizabeth Kelley by right of representation as such issue may be determined at the death of said Grace Kirwin.

"Fourteenth. If said Mary Ann Hammond mentioned in section fourth, or George Mead, son of James Mead, or either of them die leaving no surviving issue, said trustee shall dispose of the fund herein given for the benefit of such person in accordance with the provisions of section thirteenth hereof.

"Fifteenth. The said Bernard F. Kelley hereby assents to the terms of the foregoing instrument and agrees to carry out all the trusts therein stipulated.

"In witness whereof we hereto set our hands and seals this eleventh day of September, 1893. Mary <sup>her</sup> × Ann Snow. [L. s.]  
Bernard F. Kelly. [L. s.] Witnessed by Henry B. Worth."

"New Bedford, Sept. 11, 1893. Then personally appeared the said Mary Ann Snow and Bernard F. Kelley and acknowledged the foregoing instrument by them signed to be their free act and deed. Before me, Henry B. Worth, Notary Public." [Notarial Seal.]

"To the Treasurer of the Plymouth Savings Bank, Plymouth, Mass. New Bedford, Mass., Sept. 8th, 1893. For value received, I hereby assign and transfer to Bernard F. Kelley and his legal representatives, all the moneys that have been deposited, together with interest that has become due on account of Book No. 14,261 in the Plymouth Savings Bank. Mary <sup>her</sup> × Ann Snow.  
Witness to signature, Henry B. Worth."

The finding of the master as to the savings bank deposit claimed by the defendant Elizabeth Kelley was as follows:

"11. One of the savings bank deposits included in the property which the trust instrument purports to assign and transfer to the petitioner is a deposit amounting to sixteen hundred dollars, represented by book No. 56,762 in the New Bedford Institution for Savings, standing in the name of the testatrix in trust for the respondent, Elizabeth Kelley, a sister of the testatrix. Elizabeth Kelley claims the deposit. The facts in the matter are these. The account was opened by the testatrix in trust, as above stated, in 1874. It does not appear that Elizabeth Kelley knew of its existence until 1885, when, at the request of the testatrix, she executed and delivered a written transfer of it to the testatrix. In 1889, the balance of the deposit, namely, \$1,600, was carried to a new book, but under the same number and the same account, and at the time when this was done, the testatrix signed and delivered to the bank the following declaration: 'Having deposited money in the New Bedford Institution for Savings as trustee, as represented by book No. 56,762, I hereby declare that no written trust exists, and that by the terms of said trust said deposit with its dividends is payable to me or my order during my life, and after my death to my estate.' No additional deposits were made on the account subsequent to this time, and the dividends as they accrued were drawn by the testatrix. In 1889 and prior thereto the testatrix had a number of deposits of more than one thousand dollars each in the bank stated, standing, one in her own name, and the others in her name ostensibly in trust for various persons, but in reality for her own use. On several occasions subsequent to 1889, the testatrix told Elizabeth Kelley that she had put money in the bank for her, but she did not state how much or the name of the bank. On one of these occasions, she said to Mrs. Kelley: 'If you will sell your house and come to live with me, I will help you more.' Mrs. Kelley, however, did not sell her house and did not go to live with the testatrix. At different times subsequent to 1889, the testatrix told the daughter and son-in-law of Mrs. Kelley that she had put money in the bank for the latter, but she did not state how much or designate the bank. The book was never delivered by the testatrix to Elizabeth

Kelley or to any one for her, but was always kept by the former in her possession, until the day before she died, when she handed it, with the transfer to the petitioner signed by her when she executed the trust instrument, to Mary Ann Hammond to deliver to the petitioner upon her death. The trust instrument provides for the payment of one thousand dollars to Mrs. Kelley, and the third codicil contains a bequest of two thousand dollars to her. It does not appear that there was any deposit in the name of the testatrix in trust for Elizabeth Kelley, other than this deposit. On the foregoing facts I find that it was not the intention of the testatrix at any time that Elizabeth Kelley should be the owner of the deposit in question, and I find that there was no completed transfer or gift of it to her by the testatrix."

The finding of the master as to the savings bank deposit claimed by the defendant Mary Ann Hammond was as follows:

"12. In 1897, about four years after the execution of the trust instrument, the testatrix made a deposit of sixty-four dollars, on book No. 69,645, in the New Bedford Five Cents Savings Bank, in her name, in trust for Mary Hammond, meaning thereby her niece, the respondent, Mrs. Mary Ann Hammond. At this time the testatrix had two other accounts in the same bank, each in excess of one thousand dollars, one in her own name, the other in her name, ostensibly in trust for one Whitney, but in reality for her sole benefit. She continued to make deposits on the account in question until her death, the deposit then amounting to \$1,050.52. Mary Ann Hammond claims this deposit. The facts in the matter other than those above stated, are these. The testatrix, about a year before her death, said to Mrs. Hammond's husband, 'I am putting money in the bank in your wife's name for her.' On one occasion, after the account had been opened, the testatrix and Mrs. Hammond's husband being together in front of said bank, the former handed to the latter the book representing the deposit in question, together with a sum of money, and said to him, 'You take that in and deposit it; I am taking out a book for your wife.' The testatrix, about two weeks before her death, exhibited to Mrs. Hammond the book representing the deposit in question, and said to her, 'There is a book, I put money in for you.' The testatrix always kept the

book representing the deposit in question in her possession until the day before she died, when she handed to Mrs. Hammond a bag containing said book and other bank books, and instructed her to deliver the bag with its contents to the petitioner, in the event of her death. A few days after the death of the testatrix, Mrs. Hammond delivered to the petitioner the bag with all the books in it, including the book representing the deposit in question. It does not appear that there was any deposit in the name of the testatrix in trust for Mrs. Hammond, other than the deposit in question. The will provides for the payment of one thousand dollars to Mrs. Hammond, the trust instrument provides for the payment of the income of two thousand dollars to her during her life, and in a certain contingency for the payment of the principal sum to her, and the third codicil gives her two thousand dollars and the rest and residue of the estate of the testatrix, after the payment of debts and legacies. On the foregoing facts, I find that it was not the intention of the testatrix at any time that Mrs. Hammond should own the deposit in question, and I find that there was not a completed transfer or gift of it to her by the testatrix."

*H. B. Worth*, for the executor and trustee.

*L. T. Willcox*, (*W. C. Parker* with him,) for Benjamin F. Snow.

*O. Prescott, Jr.*, (*F. A. Milliken* with him,) for Elizabeth Kelley and others.

*M. H. Browne*, (*J. M. Browne* with him,) for Grace Kirwin and Norah Mead.

*G. Calkins*, for Bernard F. Kelley, Edward Kelly and George Meade.

*F. A. Milliken*, for Mary Ann Hammond.

HAMMOND, J. 1. The trust deed recites that it is executed "for a valuable consideration," contains words apt to convey the property, is under seal, which imports a consideration, and was delivered to Kelley, the transferee, who received the same and agreed "to carry out all the trusts therein stipulated." As between the parties, therefore, the legal title to the property passed to Kelley even without delivery; and, so far as respected the form of the transaction, the trust was completely created. Upon its face the trust was valid notwithstanding the provisions that



the donor during her life should have the use of the property and collect the income of the bank deposits, and the further provision that she should have the power to change the "dispositions at any time upon written notice to" Kelley. *Stone v. Hackett*, 12 Gray, 227, 232.

It is urged however by the husband of the donor that the trust was invalid because it was in the nature of a testamentary instrument, and moreover was in fraud of his rights. It appears from the report of the master that the wife had determined to change the disposition of her property provided for by her will and codicil of June 23, 1892, but her husband refused to consent to the changes she desired to make. Whereupon, "by advice of counsel, and with the view to make the desired changes in a manner which would be effective without her husband's consent, she executed" this trust deed in duplicate, giving one copy to Kelley and retaining the other. There can be no doubt of her intention. She intended to put this property beyond the control of her husband, even if in doing that it was necessary to limit her own control, or change her relation towards it. She was determined that he should have no power to say where it should go, either during her lifetime or after her death, and in the light of the facts disclosed in the report it is not difficult to see the grim determination with which she went to work. She transferred the legal title to Kelley, reserving to herself certain beneficial rights. The legal title passed at once, and all beneficial interest ceased at her death. It was a present conveyance which took effect in her lifetime. She fixed then the terms of the trust. It is true that she had the power to change its terms, but the power was conditioned upon giving written notice to Kelley. This condition, especially when taken in connection with the entire absence of any express power by will, shows that the power was to be exercised and the changes were to take effect in her lifetime and not by way of a will. In view of the purpose of the donor, the circumstances surrounding the transaction, the language of the instrument, the nature of the power given to her, it is clear that the instrument was not testamentary in its nature, but was a present conveyance of property taking effect during the lifetime of the donor, and that it was made in good faith for that

purpose. Nor is the trust invalid as against the husband. Under our statutes the right of a married woman over her personal estate during her lifetime is absolute so far as respects her husband. She may convey it or give it away upon such terms as she pleases, provided always the conveyance be real and not colorable and is made to take effect in her lifetime. *Leonard v. Leonard*, 181 Mass. 458. The case is distinguishable from *Brownell v. Briggs*, 173 Mass. 529. The trust therefore was a valid trust at the time of its creation.

It existed at the time of the donor's death. While it is true that Kelley after keeping his duplicate original of the instrument for two years returned it to the donor at her request, the master finds that her purpose in requesting its return does not appear, and it is evident that as late as June 28, 1901, several years after the return, she regarded the trust as still existing, for in her will executed by her on that day she attempts to cancel and discharge the trust agreement. But the return of the agreement without more would not change the legal title which was in Kelley nor the rights of the beneficiaries. The attempted revocation of the trust was void because made by will and no notice was given to Kelley during the life of the donor. The trust, therefore, at the time of the death of the donor, existed as it was originally created. By her death her beneficial life estate was determined, and the beneficiaries in remainder became entitled to their respective shares in accordance with the terms of the trust deed. It follows that the property covered by the trust must be so administered by the plaintiff.

2. It is contended however by Elizabeth Kelley, one of the defendants, that one of the bank books named in the trust deed, namely, Book No. 56,762, of the New Bedford Institution for Savings, was held by the donor in trust for her, and that she is therefore entitled to it. The facts bearing upon this matter are stated at length in the eleventh paragraph of the master's report. Whether they show a special trust in favor of Mrs. Kelley is a question of fact and not of law. The facts fully warrant the conclusion reached by the master that the testatrix did not at any time intend to create a trust in favor of Mrs. Kelley in this deposit, and that there was no completed transfer or gift to her. This deposit must stand as a part of the trust.

3. A similar claim is made by the defendant Mary Ann Hammond to the bank book No. 69,645, in the New Bedford Five Cents Savings Bank. This deposit was not included in the trust deed, but was a part of the estate owned by the testator at the time of her death. The facts with reference to this claim are set out in the twelfth paragraph of the report of the master, and they fully justify his finding that it was not at any time the intention of the testatrix that Mrs. Hammond should own the deposit. No trust therefore is shown in it, and it is a part of the assets of the estate of the deceased.

4. At the decease of the testatrix her estate consisted of this last deposit and of real estate of the value of \$5,000; and the question on this branch of the case is what disposition shall be made of this property, real and personal. The testatrix appears to have made a will and three codicils. At the time each was made she was the wife of Snow the defendant, who was her third husband. She was childless, her only child, a son by a former marriage, having died unmarried, leaving, however, a natural daughter, Grace Kirwin, who lived with the testatrix until a short time before her death. The first will and codicil, executed simultaneously in June, 1892, provided in substance that all the property real and personal should be reduced to cash by the executor, that \$2,000 should be paid to the husband, \$1,000 to Mary Ann Hammond, and the balance should be placed in trust for Grace Kirwin for life, with remainder to her children surviving her, or in default of such children, to the said Mary A. Hammond, Thomas Meade and Bernard F. Kelley. To this will and codicil the husband duly consented. At this time the estate consisted of the real estate above named and of the personal property afterwards conveyed by the trust deed, and it is evident that had the testatrix retained this property until her death her husband, if then surviving, would in the absence of the consent to her will have received much more than \$2,000. The second codicil simply changed the trustee and executor nominated in the will. The third was executed the day before the testatrix died, and by it the provisions of the will and first codicil, with the exception of the bequests of \$2,000 to the husband and of \$1,000 to Mary Ann Hammond, are radically changed. The trust created in the will as above stated is re-

voked, there is no bequest to Grace Kirwin, and the estate remaining after the said bequests to the husband and to Hammond is divided among various legatees, the most of whom are not named at all in the first will. In a word, the will as changed by the third codicil is, with the exceptions above named, an entirely different will from that to which the husband consented, and this radical difference extends to the portion which if the testatrix had died intestate would have gone to him.

What is the result as to the rights of the husband? Shall his consent to the will and first codicil be held to be a consent to the will as changed by the third codicil?

At common law a married woman could not make a valid will of her real estate. Nor could she make a will of her personal estate (except perhaps as to that held by her to her own separate use) without her husband's license. 2 Bl. Com. 498. *Osgood v. Breed*, 12 Mass. 525. In order thus to establish a will, however, a general consent that the wife may make a will was not sufficient. It was necessary that the husband should consent to the particular will made by the wife. 2 Bl. Com. 498. *Rex v. Bettesworth*, Strange, 891. *Cutter v. Butler*, 25 N. H. 343, 357.

While under our statutes the real and personal estate of a married woman are her separate property, yet until very recently her power to dispose of it by will always has been subject to the condition that no will should operate to deprive the husband without his consent of certain rights therein at her decease. The testatrix died June 29, 1901. At that time Pub. Sts. c. 147, § 6, with its amendments, had not been repealed. It is true that in St. 1899, c. 479, § 13, there was a provision for its repeal, but this last statute having itself been repealed before it went into effect, (see St. 1900, c. 174, and c. 450,) never became operative, and it was not until St. 1900, c. 450, which took effect January 1, 1902, (see St. 1901, c. 461,) that Pub. Sts. c. 147, § 6 as amended ceased to be the law. This statute, as amended and in force at the time of the death of the testatrix, provided, so far as material to this case, that a married woman might make a will in the same manner and with the same effect as if she were sole, except that no such will should without the written consent of her husband operate to deprive him of her real estate

not exceeding \$5,000 in value, where no issue survived her, or in any event, of more than one half of her personal estate. Pub. Sts. c. 147, § 6. St. 1885, c. 255, § 1. St. 1887, c. 290, § 2. The consent of the husband is not necessary to the validity of the will so far as it does not interfere with his rights in the estate of the testatrix, should he survive her. This consent is not in the nature of a transfer or conveyance of property in which the husband has any present right or interest, but it is only a waiver of any statutory right he might otherwise have to his wife's property after her decease. *Silaby v. Bullock*, 10 Allen, 94, 96. It is manifest that the reason which leads a husband to consent to a particular will may be found not only in the specific provisions therein made for him, but also in those which respect the other parts of the wife's property, especially that part which but for the will would upon her decease come to him. He might be willing to stand aside in the interest of his own child, and unwilling to do it in the interest of a person deemed by him undeserving, or for an object which did not commend itself to him. In the light of the principle prevailing, as before stated, at common law, namely, that the general consent of the husband that the wife might make a will was not sufficient, but that the consent must be to the particular will made, and of the principles applicable generally to a waiver, and of the weighty and obvious objections to a contrary interpretation, we are of opinion that the consent required by the statute is like that theretofore required at common law, and that a consent to one will is not applicable at least to a subsequent will which changes substantially the disposition of the property as to which the consent is requisite. It follows that the husband in this case never consented to the will of his wife as finally allowed. He is entitled to her real estate to the value of \$5,000, and to one half of her personal estate as if she had died sole. But of course he cannot have also the specific legacy of \$2,000.

Under this rule the husband in this case will apparently take substantially all the real estate, and there will be only a little, if any, real estate, and but a small amount of personal property, remaining.

It remains to be considered how this residue shall be distributed. It is plain that the testatrix did not intend by the third

codicil to revoke the legacies contained in the second item of the original will. The bequest therefore of \$1,000 to Mary Ann Hammond must stand as originally drawn. It is also plain that the bequests contained in the fourth to the eighth clauses, both inclusive, of the third codicil were intended to relate only to the distribution of the trust fund and were to be paid only from it. This part of the will becomes inoperative. The language of the residuary clause in favor of Mary Ann Hammond, however, is broad enough to cover whatever may be left of the estate outside of the trust fund.

The result is that the plaintiff holds the property named in the trust deed, including the deposit represented in book No. 56,762 in the New Bedford Institution for Savings, as trustee under the deed and not as executor, and he is to distribute it in accordance with its terms. He holds the deposit represented by book No. 69,645 in the New Bedford Five Cents Savings Bank as executor, as a part of the assets of the estate of the testatrix free from any trust. The rights of the husband in the estate are as hereinbefore stated; and the residue of the estate goes to Mary Ann Hammond.

*Decree accordingly.*

185	303
187	595

## MUSKEGET ISLAND CLUB vs. INHABITANTS OF NANTUCKET.

Bristol. January 19, 1904. — March 9, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Evidence, Opinion: Experts, Of value of land. Practice, Civil, Exceptions.*

Although the decision of a presiding judge as to the qualification of an expert is conclusive unless upon the evidence it appears to be erroneous, yet where it appears that a witness, offered as an expert as to the value of a certain small island taken for a public park, has known the land in question for many years, has traded to a considerable extent in land in the same town, and in six different years near the time when the land was taken has valued the land as an assessor of the town, the exclusion of his testimony on the ground that he is not qualified as an expert is error in law.

Where a petitioner for damages, for the taking of a small sand island off the coast of Nantucket, based his claim on the value of the land for shooting purposes, it was held that a witness offered by the respondent, otherwise qualified as an ex-

pert to testify as to the value of the land, should not have been excluded as an expert because he testified that he never had been on the island and personally knew nothing of the shooting there although he had seen a good deal of shooting in the vicinity, because the real question was the fair market value of the land in view of all the purposes for which it was adapted or might be used, and the jury might not have taken the view of the petitioner that its value was to be determined for shooting purposes alone.

The rule, that an exception will not be sustained to the exclusion of testimony unless it appears what the testimony would have been, does not apply to the exclusion of the testimony of a witness, offered as an expert as to the value of land, solely on the ground that he was not qualified as an expert.

PETITION, filed September 13, 1898, under St. 1895, c. 442, § 3, by the Muskeget Island Club, a corporation organized under the laws of this Commonwealth, for damages for the taking of a portion of the island of Muskeget in the town of Nantucket, west of Nantucket and the island of Tuckernuck, for a public park.

At the trial in the Superior Court *Lawton, J.* excluded the testimony of Hiram C. Folger, a witness offered as an expert by the respondent, on the ground that the witness was not qualified as an expert. The jury returned a verdict for the petitioner in the sum of \$7,000; and the respondent alleged exceptions.

*E. A. Whitman*, for the respondent.

*H. N. Shepard*, for the petitioner.

HAMMOND, J. The question whether a witness offered as an expert is qualified to testify as such, is to be decided by the presiding judge as a question of fact, and his decision is conclusive unless upon the evidence it appears erroneous in law. *Perkins v. Stickney*, 132 Mass. 217. We cannot say that in coming to the conclusion that the several witnesses called by the petitioner were qualified the judge erred in law. In each case the evidence justified the finding.

But we think that the evidence as to Folger did not warrant his exclusion. He testified that he had lived in Nantucket over sixty years, and for the last seventeen years had held town offices, prior to which time he had been a farmer for twenty-six years; that he had known a great deal of all kinds of land in Nantucket, and had bought and sold for himself and other people; that he knew only by hearsay whether land had been sold for shooting places on the sandy beaches, but had heard of some sales on Eel Point for that purpose. He further testified

that he had been an assessor of the town of Nantucket for six years, being the years 1888 to 1891, both inclusive, 1896 and 1897, and in that capacity had assessed the island of Muskeget; that he never had visited Muskeget, but had visited the island of Tuckernuck and Eel Point and Smith Point, the western points of Nantucket, where his father had lived. He also testified that while he never had been on Muskeget he had sailed within half a mile of it, that he knew it was a sand heap, that he knew nothing of the shooting there except from his friends "who go shooting there," and that he had seen a great deal of shooting on Smith and Eel Points and had been there a great many times. We do not understand that any of these statements are taken to be untrue, or that the witness was excluded upon the ground of mental infirmity from age or any other cause.

Here then is a man who has been a resident of the town for sixty years, for twenty-six years of which time he was a farmer, who has traded to a considerable extent for himself and others in land situated in the town, who has seen the land in question and knows its situation and general character, who is somewhat acquainted with shooting in that vicinity, who has held important town offices for years, and who above all has been called upon, in the discharge of his official duty and under his official oath as an assessor for six different years close around the time when the land was taken, some before and some after the taking, to appraise this very land and declare its market value. It seems clear that upon this testimony he is qualified as an expert. He was a typical islander, apparently of the most reliable character, had passed his life in that vicinity, and, in many ways, especially in his capacity as an assessor, had had his attention called to this land and in the latter capacity had valued it under an official oath. The knowledge, in part at least, was acquired as an officer whose duty it was to ascertain the value of this land for purposes of taxation. See *Swan v. Middlesex County*, 101 Mass. 178, 177. If it be said that the petitioner's claim was based upon the value of the land for shooting purposes, the answer is that while that may have been one of the purposes to which it might be devoted, yet it could not have been certain that the jury would take that view, and the real question was



its fair market value in view of all the purposes for which it was adapted or might be used. The fact also that Folger had not been upon the land was of but little, if any, importance under the circumstances so far as respected its character. It was what it appeared to him to be, a sand heap.

It is argued by the petitioner that inasmuch as the record fails to show what the testimony of Folger would have been, or what the respondent expected to prove by him, the exception to his exclusion should not be sustained; and in support of that proposition it relies upon those cases where an exception to the exclusion of a question has been overruled upon the ground that the record does not show what the witness was expected to say, or, if permitted to answer, would have said. In such a case it does not appear that the exclusion of the question resulted in the exclusion of any evidence material to the issue.

But here it is plain that the only question then before the court was not whether the testimony of the witness, if he were allowed to give it, would be material, but whether he was qualified to testify as an expert; and he was excluded not because his testimony would be immaterial, but on the ground that he was not qualified to testify at all. We think that the rule upon which the petitioner relies should not be extended to such a case.

*Exceptions sustained.*

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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY  
vs. HETTY GREEN.

Hampden. September 23, 1903. — March 30, 1904.

Present: MORTON, LATHROP, BARKER, HAMMOND, LORING,  
& BRALEY, JJ.

*Contract, Implied: Common counts, Consideration. Pleading, Civil.*

No action lies to recover money paid for taxes for which the defendant was liable not paid at the defendant's request.

A count for money paid, bad for want of an averment that the money was paid at the defendant's request, is not cured by an allegation of a subsequent promise of the defendant to pay the money to the plaintiff.

If one pays by mistake a tax bill on land belonging to another person supposing it

to be for a tax upon his own land, and the landowner promises to repay the amount if permitted to see his account kept by the person who paid the tax to ascertain whether the tax in fact was paid on his land, the performance of this condition is no consideration for the promise of the landowner to repay the amount of the tax, as he already had a right to examine his own account.

Under a count upon an account annexed, a plaintiff can recover for money paid without an express averment that the money was paid at the defendant's request, such an averment being implied by force of R. L. c. 173, § 6, cl. 8.

CONTRACT for \$1,105.88 paid by the plaintiff for taxes for which the defendant was liable, with four counts as described in the opinion. Writ dated December 1, 1902.

The defendant demurred. The Superior Court sustained the demurrer, and gave judgment for the defendant. The plaintiff appealed.

The case was submitted on briefs at the sitting of the court in September, 1903, and afterwards was submitted on briefs to all the justices except *Knowlton*, C. J.

*W. W. McClench*, for the plaintiff.

*J. B. Carroll & W. H. McClintock*, for the defendant.

LORING, J. In this case both the plaintiff and the defendant owned land in the northeast one fourth of section 13, Township 37, north, Range 13, in Cook County, Illinois. The plaintiff received a bill for taxes on a lot in said northeast one fourth, which it paid, supposing it was for a tax on its land. It turned out subsequently that it was for a tax on the defendant's land; and thereupon this action was brought to recover the amount of the tax from the defendant. The declaration contained four counts. The first was a count on an account annexed; the second stated the facts and concluded with a statement that by reason thereof the defendant became bound to repay the money to the plaintiff because it was paid for the defendant's benefit; the third count added that upon the mistake being discovered the defendant agreed to repay the amount to the plaintiff, and in the fourth the plaintiff counted on a promise to repay the amount if the plaintiff would give the defendant an opportunity to examine her own accounts. It is alleged that all the counts are for the same cause of action.

The second count is bad because it is not alleged that the money was paid at the defendant's request. *Roxbury v. Worcester Turnpike Co.* 2 Pick. 41. *Winsor v. Savage*, 9 Met. 346.

*Middleborough v. Taunton*, 2 Cush. 406. *South Scituate v. Hanover*, 9 Gray, 420. *Bicknell v. Bicknell*, 111 Mass. 265. *Mansfield v. Edwards*, 136 Mass. 15.

This defect in the second count is (so the plaintiff contends) cured by the allegation in the third and fourth counts of a subsequent express promise on the part of the defendant to pay this sum to the plaintiff. Its contention is that a subsequent promise is equivalent to a previous request, and that *Gleason v. Dyke*, 22 Pick. 390, is an authority for that proposition; that *Gleason v. Dyke* was cited with approval in *Smith v. Bartholomew*, 1 Met. 276, and never has been overruled. But although it is not referred to by name, *Gleason v. Dyke* was overruled by *Dearborn v. Bowman*, 3 Met. 155, so far as this ground for the decision in *Gleason v. Dyke* goes. The original case of *Gleason v. Dyke* was well decided on the ground that the plaintiff was forced to pay the money to protect the estate which the defendant had a right to redeem and did redeem. In the subsequent case of *Winsor v. Savage*, 9 Met. 346, 348, it is again stated that a subsequent ratification is equivalent to an original request, but this statement was *obiter* in that case. On the other hand *Dearborn v. Bowman* has since been affirmed on this point in *Shepherd v. Young*, 8 Gray, 152, *Chamberlin v. Whitford*, 102 Mass. 448, and *Moore v. Elmer*, 180 Mass. 15, 17, and must be taken to be the law of the Commonwealth. It is not necessary to discuss the cases cited by the plaintiff from other jurisdictions.

The plaintiff has not argued that the fourth count is helped by the allegation of the consideration which it contains.\* The defendant's right to examine her own accounts was not within the plaintiff's control and his giving her an opportunity to do what she had a right to do is not a valid consideration for a promise on her part.

But we are of opinion that the demurrer to the count on the

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\* The allegation referred to was as follows: "That upon discovering the mistake, the plaintiff notified said defendant thereof and demanded payment of said sum from said defendant, and said defendant promised and agreed with said plaintiff that if said plaintiff would give the defendant opportunity to examine her accounts and to ascertain whether or not said plaintiff had in fact paid said taxes so as aforesaid assessed upon her land, she would repay said plaintiff the amount so paid by it, if it had in fact paid said taxes. And said plaintiff did wait a reasonable time for said defendant to ascertain said facts."

account annexed should have been overruled. The defendant's contention here is that it is not alleged in the account annexed that the money was paid at the request of the defendant. It seems to be assumed in *Rider v. Robbins*, 13 Mass. 284, that such an allegation was necessary at common law, while in *Newmarket Iron Foundry v. Harvey*, 23 N. H. 395, it seems to have been assumed that when the account annexed was used for money paid the common law imported the allegation that it was paid at the request of the defendant. However it may have been at common law, we are of opinion that under the practice act such an allegation is by legal intendment included in the count.

It is provided by the practice act, R. L. c. 173, § 6, cl. 7, that the common counts shall not be used unitedly; and by cl. 8, that a count on an account annexed may be used if one or more items are claimed, any of which would be correctly described by any one of the common counts. The commissioners, in a note to these two clauses as they were drafted by them, (Hall's Mass. Practice Act, 160, 161,) explained that their purpose in these two clauses was to avoid the confusion resulting from the use of all the common counts unitedly. What was meant by that was that the practice of inserting a number of the common counts to ensure the case proved at the trial being covered by the allegations in the declaration led to confusion, and to avoid that confusion the use of more than one of the common counts for one cause of action or item was forbidden; and it was provided that if the plaintiff was uncertain what common count would meet the case when the evidence was in he could use a count on the account annexed, and that should be sufficient if the case proved would be correctly described by any one of the common counts. By the original practice act, St. 1851, c. 233, § 2, cl. 7, the count on an account annexed could be used only when two or more items were claimed. This left a plaintiff who brought an action to recover for only one item in the predicament of not being able to insert more than one common count in his declaration, and of being forbidden to use the count on an account annexed under the statute which allowed him to do so in case he was not entirely certain what case would be shown in evidence. This was corrected by the practice act of the following year, which allowed a plaintiff to use a count on an account annexed

when only one item was claimed as well as when two or more were in issue. St. 1852, c. 312, § 2, cl. 7. The result is that by force of the statute a plaintiff who declares on a count on an account annexed has by legal intendment made with respect to the item stated in the account annexed all the allegations contained in all the common counts, and the first count in the declaration standing by itself was good.

We do not think that it is bad because it is alleged in the declaration that all counts are for the same cause of action. We cannot say that the plaintiff did not insert the count on an account annexed for the very purpose of having that count in the declaration in case he succeeded in showing at the trial that the money was paid at the defendant's request, and that he inserted the other three counts to meet his case if he did not succeed in proving that the defendant requested it to pay the tax. The result is that the plaintiff has a right to go to trial for the purpose of proving that the money was paid at the defendant's request, but for that purpose only.

*Judgment sustaining demurrer to first count reversed ; judgment sustaining demurrer to other counts affirmed.*

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FIRST UNIVERSALIST SOCIETY IN SALEM vs. EDWARD  
S. BRADFORD.

Essex. November 5, 1903. — March 30, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Tax, On collateral inheritances.*

The exemption from the succession tax imposed by St. 1891, c. 425, § 1, (R. L. c. 15, § 1,) of gifts "to or for the use of charitable, educational or religious societies or institutions, the property of which is by law exempt from taxation," exempts bequests and devises to a society or institution whose property is generally exempt from taxation, whether the particular gift when in the hands of the society or institution will be exempt from taxation or not.

A bequest or devise to a religious society is not subject to a succession tax under St. 1891, c. 425, § 1, (R. L. c. 15, § 1,) and this rule applies to a devise to a religious society of land and a dwelling house "to be used and occupied only as a parsonage", which would be taxable to the religious society when thus used and occupied.

**BILL IN EQUITY**, filed June 8, 1901, in the Probate Court for the County of Essex by the First Universalist Society in Salem, praying for the determination of the question of its liability to pay to the Commonwealth a succession tax under St. 1891, c. 425, of five per cent on the value of certain real estate devised to the plaintiff by the will of Walter S. Dickson, late of the town of Hamilton.

The Probate Court found that the plaintiff was a religious society, duly incorporated, whose property is by law exempt from taxation, and made a decree that the real estate in question was not subject to the tax.

On appeal the case came on to be heard before *Morton, J.*, who, by agreement of the parties, reserved it for determination by the full court.

The case was submitted on briefs at the sitting of the court in November, 1903, and afterwards was submitted on briefs to all the justices.

*W. H. Rollins*, for the plaintiff.

*F. B. Greenhalge*, Assistant Attorney General, for the defendant.

**LORING, J.** Walter S. Dickson, by his last will and testament, which was duly admitted to probate in June, 1900, devised to the First Universalist Society in Salem a parcel of land "with the dwelling house and outbuildings thereon (the same being used and occupied by me as a homestead) to be used and occupied only as a parsonage for said Church, and for the same purpose I give said Church all the carpets in my said homestead and all the furniture therein not otherwise disposed of by me."

The treasurer of the Commonwealth claims that a succession tax is due on this devise and bequest under St. 1891, c. 425, § 1. (Now R. L. c. 15, § 1.) The devisee claims that the devise and bequest come within the clause excepting from the operation of the act property which shall pass "to or for the use of charitable, educational or religious societies or institutions, the property of which is by law exempt from taxation."

This clause of exemption does not find in our statutes the counterpart which its language would lead one to expect. There is no clause in the general laws exempting the property of charitable, educational and religious societies or institutions from

taxation. More than that, there is no clause which in terms deals with the exemption from taxation of the property of charitable and educational institutions.

The only act, in June, 1900, which applied to charitable and educational institutions was St. 1889, c. 465, now R. L. c. 12, § 5, cl. 3. That act applies to "literary, benevolent, charitable and scientific institutions and temperance societies," and provides that the personal property of such institutions and societies incorporated within the Commonwealth, and the real estate belonging to them and occupied by them or their officers for the purpose for which they were incorporated shall be exempt, with a proviso that none of the real or personal estate of such corporations shall be exempt "when any portion of the income or profits of the business of such corporations is divided among their members or stockholders or used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes." Where the income of property is used to support the institution the property of such institutions is exempt under the act when invested in personal securities, but is taxable when invested in real estate.

The property of religious societies did not come within this act, but was dealt with by Pub. Sts. c. 11, § 5, cl. 7, now R. L. c. 12, § 5, cl. 7. That clause provides that "houses of religious worship owned by a religious society, or held in trust for the use of religious organizations, and the pews and furniture (except for parochial purposes)" shall be exempt. Both the personal and real property of a religious society is taxable, even although the income is used to support religious worship. See Pub. Sts. c. 11, § 22 (now R. L. c. 12, § 25); *Greene Foundation v. Boston*, 12 Cush. 54; *Boston Society of Redemptorist Fathers v. Boston*, 129 Mass. 178; and this applies to real estate used as a parsonage. *Third Congregational Society of Springfield v. Springfield*, 147 Mass. 396.

The contention of the treasurer is that the exemption clause in question is to be construed to provide that property which shall pass to or for the use of charitable, educational or religious societies or institutions is to be exempt to the extent to which the property of such societies or institutions is exempt by general laws of taxation.

But we are of opinion that the exemption depends upon this question: Is the society or institution one whose property is generally exempt from taxation; and that the question is not: Is the property which passes to the society or institution one which will be exempt from yearly taxation under general laws.

In stating what the test is we have stated that it is whether the property of the society or institution is generally exempt from taxation, because no charitable, educational or religious society or institution is wholly exempt from taxation, as has already appeared. There are or may be charitable or educational institutions none of whose property is exempt, namely, institutions where "any portion of the income or profits of the business of such corporations is divided among their members or stockholders or used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes." It evidently was intended to exclude these from this clause of exemption.

The objection to the construction which the treasurer is contending for is in the first place that it is not what the language used means. The act provides that property which passes to charitable, educational or religious societies or institutions "the property of which is by law exempt from taxation" shall be exempt from a succession tax; it does not provide that property which passes to such societies or institutions shall be exempt to the extent to which the property passing to them will be exempt from taxation when held by them. To adopt the construction here contended for is to read into the act a clause which is not there. In the second place, the thing dealt with by the two exemptions is altogether different. Exemption from the succession tax deals with the passing of property to a legatee or devisee; the exemption from yearly taxation deals with the holding of property. That is to say, the exemption from yearly taxation is based upon the purpose for which property is held. As a rule, a legacy or devise is not given for a purpose. For that reason it would be difficult to apply the exemption from yearly taxation to the passing of property, and we do not think that the Legislature intended to adopt that as the test of exemption in case of the succession tax.

It happens in the case at bar that the property is devised and



bequeathed for a parsonage; that is to say, it happens in the case we have before us that the way in which and the purpose for which the property devised and bequeathed is to be held is stated and established. But this is an accident, and an accident which is not only the exception rather than the rule, but is a rare exception. In most cases real estate is devised or personal property bequeathed to charitable, educational or religious societies or institutions with a full right in the society or institution to use or transfer and convey it as it may please. There is no reason for supposing that the Legislature thought the form in which the property passes to it to be significant. There is no reason for supposing that, in case of a devise or a legacy to an educational institution which can be changed by it the next day, the liability to a succession tax is to be determined by the fact that the devise or legacy comes to the institution as personal property, in which case it would not be taxable under the rule contended for by the treasurer, in place of coming to it as real estate, in which case it would be taxable under that rule.

And again, there is no reason to suppose that the Legislature intended that a succession tax should be imposed on a legacy to a religious society but not on a legacy to an educational institution. Yet if the contention of the treasurer is right, this result would follow, for the personal property of an educational institution is exempt while the personal property of a religious society is subject to yearly taxation.

For these reasons we are of opinion that the test is this: Is the society or institution one whose property is generally exempt from taxation? Their houses of religious worship are the principal property held by religious societies, and we are of opinion that a devise to a religious society is a devise to a society whose property is generally exempt from taxation and is not subject to a succession tax.

*Decree affirmed.*

RACHEL GLASSEY vs. WORCESTER CONSOLIDATED STREET  
RAILWAY COMPANY.

ANDREW J. GLASSEY vs. SAME.

185	315
d186	602
185	315
f188	433

Worcester. September 29, 1903. — March 31, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Negligence, Proximate cause.*

If a street railway company leaves a large reel, which has been used for holding wire, lying on its side in a secure position on the grass within the limits of a highway but outside of the travelled portion, thus violating a town by-law, and children, passing along the street on their way to school, take the reel from the place where it has been left and roll it down the street so that it strikes a carriage, throwing out and injuring a woman, the railway company is not liable for the injuries thus caused, because, assuming that leaving the reel in the highway is evidence of negligence, such negligence is the remote and not the direct and proximate cause of the injury.

MORTON, J. These two cases were tried and have been argued together. At the close of the plaintiffs' evidence in the Superior Court the presiding judge ruled at the defendant's request that the plaintiffs could not recover and directed verdicts for the defendant. The cases are here on exceptions by the plaintiffs to these rulings.

The case of the plaintiff Rachel, who is a married woman, is for injuries alleged to have been received by her in consequence of the negligence of the defendant in leaving a large reel by the side of or in Cameron Street in Clinton, which some boys rolled down the street and which struck the carriage in which the plaintiff was driving and threw her out and caused the injuries complained of. The other action is by the husband for the loss of consortium and the expenses incurred by him because of the injuries to his wife.

The evidence would have warranted a finding, and for the purposes of these cases we assume that such was the fact, that the reel belonged to the defendant and had had feed wire upon it which had been strung upon its poles by persons in its employ. But it is not clear whether the reel was left on a vacant piece of land just outside the limits of the highway, or

whether it was left within the location of the highway. We assume as most favorable to the plaintiffs that it was left within the limits of the highway. The uncontradicted testimony shows, however, that it was left outside the travelled portion of the highway lying on its side in the grass in a secure position. The plaintiffs introduced in evidence a by-law of the town forbidding persons to leave obstructions of any kind in the highway without a written license from the road commissioners or other board having charge of the streets, and they contend that, if the reel was left within the location of the highway when forbidden by the by-law, that of itself constituted such negligence as renders the defendant liable. But the most, we think, that can be said of this contention is that the leaving of the reel within the limits of the highway was evidence of negligence, not that in and of itself it rendered the defendant liable or should be held as matter of law to have contributed directly to the accident. *Hanlon v. South Boston Horse Railroad*, 129 Mass. 310. The question is whether in leaving the reel lying on its side in the grass near the road the defendant ought reasonably to have anticipated that children passing along the street on their way to school, or for other purposes, would take it from the place where it had been left, and engage in rolling it up and down the street, and that travellers on the highway would thereby be injured. The question is not whether a high degree of caution ought to have led the defendant to anticipate that such a thing might possibly occur, but whether it ought reasonably to have been expected to happen in the ordinary course of events. In the former case the defendant would not be liable, and in the latter it might be held liable, notwithstanding an active human agency had intervened between the original wrongful act and the injury. The case of *Stone v. Boston & Albany Railroad*, 171 Mass. 536, furnishes an illustration of the former class of cases, and the case of *Lane v. Atlantic Works*, 111 Mass. 136, of the latter.

It is clear that the plaintiff Rachel was in the exercise of due care. But assuming that the reel was left in the highway and that that was some evidence of negligence, we think that such negligence was the remote and not the direct and proximate cause of the plaintiff Rachel's injury. The material facts

with the inferences to be drawn from them are not in dispute, and in such a case the question of remote or proximate cause is one of law for the court. *Stone v. Boston & Albany Railroad*, 171 Mass. 536, 543. *McDonald v. Snelling*, 14 Allen, 290, 299. *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 122. The defendant's servants left the reel in a secure position lying on its side in the grass outside the travelled part of the street, and not in immediate proximity to it. As the reel was left it was entirely safe. It was not possible for a slight or accidental movement to set it in motion so as to injure others, as in the case of *Lane v. Atlantic Works*, *ubi supra*. The reel was large and cumbersome and required active effort on the part of a number of children to move it, from the place where it had been left, on to the travelled part of the highway, and set it in motion. And in order to injure the plaintiff or any other traveller on the highway it was necessary that it should be set in motion at a time when the plaintiff or other travellers were passing along the highway. In other words, in order to render the defendant liable, it must appear, not only that it should have anticipated that in the ordinary course of events school children would take the reel from the position where it had been securely left outside the travelled part of the road, but that they would set it in motion on the highway under such circumstances that it was liable to injure a traveller thereon. It seems to us that, conceding that there was evidence of negligence on the part of the defendant in leaving the reel where its servants did, they could not be required to anticipate that this would happen in the ordinary course of events, and, therefore, that the negligence was too remote. See *Speake v. Hughes*, [1904] 1 K. B. 138.

*Exceptions overruled.*

*A. P. Rugg*, (*C. W. Saunders* with him,) for the plaintiffs.

*C. C. Milton*, (*C. Bullock* with him,) for the defendant.

185 318  
188 543

ELLIUS A. EMERSON, administrator, *vs.* METROPOLITAN LIFE  
INSURANCE COMPANY.

Essex. November 5, 1903. — March 31, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

*Insurance, Life. Practice, Civil.*

A life insurance policy, issued after April 11, 1894, was made payable to the wife of the insured, if living, otherwise to the legal representatives of the insured, upon the receipt by the insurance company and its approval of proofs of death of the insured. The wife of the insured survived him and submitted proofs of death, but died two days later. The proofs of death had not been acted on by the company, which furnished an additional blank to be filled out by the attending physician of the insured. The administrator of the widow procured and delivered the required certificate, and sued on the policy. *Held*, that the right of action had vested in the widow and passed to her administrator.

A condition in a life insurance policy required the insured to have been in sound health at the time the policy was issued. There was evidence that at the time the policy was issued the insured was subject to epileptic fits and that he died of epilepsy. There also was evidence in contradiction of this. In an action on the policy, the jury found that the insured was in sound health when the policy was issued, and that he did not have epileptic fits before that time. The defendant excepted to a refusal of the presiding judge to rule that, if at the date of the policy the insured was subject to fits or bad spells or loss of consciousness, he was not in sound health at that time. *Held*, that the finding of the jury made this request immaterial and the defendant was not harmed by the refusal. *Whether* it could have been ruled as matter of law, that the insured was not in sound health if subject to fits or bad spells or loss of consciousness, *quære*.

MORTON, J. This is an action upon a policy of insurance issued by the defendant company upon the life of one John C. Varney. The policy is dated June 13, 1898, and is for \$2,000. It is made payable "to Mary H. Varney wife of the insured . . . if living, otherwise to the legal representatives of the insured, upon the receipt by the company at its home office and its approval of the proofs of death of the insured, made in the manner, to the extent and upon the blanks required by condition Six, and upon the surrender of this policy." John C. Varney died September 30, 1899. Proofs of death furnished by the defendant were filed with it by Mary H. Varney on or before October 12, 1899. Mary H. Varney died October 14, 1899, and the plaintiff is administrator of her estate. The proofs of death furnished by

her were not acted on by the defendant, but an additional blank was furnished by it to be filled out by the physician who had attended Varney in 1871, 1883, and 1885. The administrator completed this additional blank November 7 and filed it with the defendant November 8, 1899. The date of the writ was January 21, 1901.

There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the judge to give certain rulings that were requested.

The first question is whether the action can be maintained by the plaintiff as administrator of the estate of the wife. We think that it can. The applications are not before us and it may be doubtful whether the contract contained in the policy is not a contract between the defendant and the wife. See *Millard v. Brayton*, 177 Mass. 533. But, however that may be, it is expressly provided by R. L. c. 118, § 73, that "the person to whom a policy of life insurance, issued subsequent to the eleventh day of April in the year eighteen hundred and ninety-four, is made payable may maintain an action thereon in his own name." The policy in this case was issued after April 11, 1894, and comes therefore within the statute. No good reason can be assigned why the right of action thus given should not survive and pass to the administrator when it has once vested, or why the right should be regarded as a purely personal privilege bestowed on the person to whom the policy is made payable. As we construe the policy, the defendant agreed to pay the wife, if living at the death of the husband, \$2,000 at its office in New York upon receipt and approval by the company of proofs of the death of the husband made in the manner and to the extent and upon the blanks required and upon surrender of the policy. The beneficiary could not of course be required to surrender the policy except upon payment, and so far as appears the defendant has refused to pay at New York or anywhere. The wife survived the husband and proofs of death on blanks furnished by the defendant were filed with the defendant by the wife before her death. It is true that these blanks were not acted upon by the company, and an additional blank was sent which was not completed and returned till after her death by her administrator. But the right of the wife or of her estate to the proceeds of the

policy depended primarily on her surviving her husband. It might be defeated by failure on her part or on the part of her administrator to comply with the conditions of the policy, but subject to that contingency the right to the proceeds of the policy vested in her at the death of her husband. There is nothing to show that the proofs were not satisfactory as proofs of death, and we think as already observed that the action can be maintained by her administrator.

The application was made a part of the policy and the answers and statements were declared to be warranties. One of the conditions on which the policy was issued was that the insured was at the time in sound health. The defendant contended that the insured was an epileptic at the time of the application, and that the answers to certain material questions were false and on all the evidence requested the judge to direct a verdict for the defendant and to instruct the jury that if on the thirteenth of June, 1898, the date of the policy, the health of the insured was such that he was liable to have fits, or bad spells, or loss of consciousness he was not in sound health at that time. The judge declined to rule as thus requested, except so far as covered by the charge, and submitted the case to the jury with the question "Did John C. Varney, the person insured, have epileptic fits prior to the date of his application for insurance, June 9, 1898?" The jury answered "No."

There was much evidence tending to show that the insured was subject to epileptic fits at the time when the policy was issued and that he died of epilepsy. But there was also evidence of a contrary character. It would serve no useful purpose to attempt to review the testimony in detail. The question was eminently one of fact for the jury and was submitted to them with full instructions. They were specially instructed, amongst other things, that the policy did not attach unless at the date of delivery the insured was in sound health and that the plaintiff could not recover unless he satisfied them by a fair preponderance of the evidence that the insured was in sound health on that day. This was in substance repeated. We doubt whether it could have been ruled as matter of law that the insured was not in sound health if liable to have fits or bad spells or loss of consciousness. But if it should have been so ruled the defendant

was not harmed by the refusal to instruct as requested because the jury found that the insured was not subject to epileptic fits prior to the date of the application and consequently that he was not liable to have fits, or bad spells or loss of consciousness.

The result is that we think that the exceptions should be overruled.

*So ordered.*

*G. W. Cox*, for the defendant.

*J. H. Pearl*, for the plaintiff.

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EVA F. SNOW *vs.* NEW YORK, NEW HAVEN, AND  
HARTFORD RAILROAD COMPANY.

THEODORE SNOW *vs.* SAME.

Suffolk. November 12, 1903. — March 31, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Damages, Remoteness. Evidence, Admissions.*

In an action by a woman against a railroad company for injuries from a collision, where the defendant's liability was admitted and the only questions related to the damages to be recovered, it appeared, that the plaintiff by reason of her injuries from the collision became subject to attacks of dizziness, that she climbed into a pantry sink by means of a chair, to look at a leak in a water pipe above, and while standing in the sink had an attack of dizziness, fell to the floor and broke her wrist. She was allowed to testify to these facts, but the presiding judge excluded evidence of pain and inconvenience suffered from the broken wrist and instructed the jury not to consider the consequences of the broken wrist. *Held*, that the exclusion and the ruling were right, as the breaking of the wrist was not due to the railroad collision but to the plaintiff's voluntary and independent act in climbing into the sink to look at the water pipe.

In an action of tort for personal injuries, a letter of the plaintiff to the defendant stating the claim and the amount demanded, which does not contain an offer of compromise, is admissible in behalf of the defendant as bearing upon the genuineness and extent of the plaintiff's alleged injuries.

MORTON, J. These are two actions of tort which were tried together. The first is for injuries received by the female plaintiff in a collision on the defendant's railroad on December 16, 1899, while a passenger, and the second is by the husband for



expenses and loss of consortium. The liability was admitted and the only question in each case was the amount of the damages. The verdicts were unsatisfactory to the plaintiffs, and the cases are here on their exceptions to certain rulings and instructions and to the admission of certain testimony.

There was testimony tending to show that as the result of the injuries received the female plaintiff became subject to attacks of dizziness which continued at intervals from the time of her injury down to the time of the trial, which occurred in May, 1903, and there was testimony tending to show that on one occasion when alone in her home several months before the trial she got into a pantry sink by means of a chair to see about a leak in the water pipe above the sink, and while standing in the sink had an attack of dizziness, and fell to the floor and broke her wrist. She offered to show the pain and other inconveniences which she suffered from the broken wrist, but the judge excluded the evidence, and instructed the jury not to consider the consequences of the broken wrist, as they were too remote and the defendant was not responsible. The plaintiff excepted to these rulings and instructions and this constitutes the first exception.

The case of *Raymond v. Haverhill*, 168 Mass. 382, would be decisive on this point except for the fact that it was a highway case. It was held in that case that the plaintiff whose right ankle had been injured by a defect in a sidewalk in the defendant city so that it became weak and was liable at times to turn and fail to support her could not recover for injuries received by her in consequence of a fall due to the failure of the ankle to support her as she was stepping from a chair to a settee while assisting in preparing for an entertainment in a public hall. It was held that the injuries so received were not the direct and immediate results of the injury received in consequence of the defect in the public way, but were due to a new and independent cause. It is true that cities and towns are not liable for consequential injuries resulting from defects in the public ways. *Nestor v. Fall River*, 183 Mass. 265. But there was a strong intimation in *Raymond v. Haverhill*, *ubi supra*, that, if the action had been for negligence at common law, the later injuries could not have been considered as the natural and proximate

result of the injury received in consequence of the defect in the sidewalk. And if in that case what took place was regarded as constituting a new and intervening cause, as it was, we do not see how what took place in the present case can be otherwise regarded. The breaking of the wrist certainly was not the direct result of the collision. That caused or may have caused conditions which contributed to it, and but for whose existence it perhaps would not have happened. The breaking of the wrist was due not to the collision but to her conduct in getting up into the pantry sink to look at the leak in the water pipe, and was the result of voluntary and independent action on her part. The plaintiff relies amongst other cases on *Brown v. Chicago, Milwaukee & St. Paul Railway*, 54 Wis. 342. But this court expressly declined to follow that case in *Raymond v. Haverhill*, *ubi supra*. We think that this exception also must be overruled.

The remaining exception relates to the admission of two communications sent by the plaintiff to the defendant. The plaintiff objected to their admission on the ground that they related to a compromise of the plaintiff's claim. The letters cannot be regarded as offers of compromise. They were a statement of the plaintiff's claim and of the amount which she demanded, and were admissible as bearing upon the genuineness and extent of her injuries. See *Snow v. Batchelder*, 8 Cush. 513; *Harrington v. Lincoln*, 4 Gray, 563.

*Exceptions overruled.*

*J. E. Cotter*, (*T. F. McAnarney* with him,) for the plaintiffs.

*C. F. Choate, Jr.*, for the defendant.

## COMMONWEALTH vs. EDWARD BARKER.

Suffolk. November 16, 1903. — March 31, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Evidence. Husband and Wife.*

Under R. L. c. 175, § 20, either a husband or a wife can testify against the other in a criminal proceeding, if the one testifying is willing to do so.

INDICTMENT, found in the county of Suffolk on January 10, 1903, charging the defendant with polygamy on April 21, 1902.

The jury returned a verdict of guilty; and the defendant alleged exceptions, raising the single question stated by the court.

*P. H. Kelley*, for the defendant.

*J. D. McLaughlin*, Second Assistant District Attorney, for the Commonwealth, submitted a brief.

MORTON, J. This is an indictment against the defendant for polygamy. There was a verdict for the Commonwealth, and the case is here on the defendant's exceptions. The person alleged to be the lawful wife of the defendant was called as a witness against him and without the consent and against the objection of the defendant was allowed to testify to material facts tending to prove his guilt. The only question is whether she should have been allowed to so testify without his consent. At common law a married woman could not testify in such a case against her husband: *Kelly v. Drew*, 12 Allen, 107. But by various statutes which were consolidated in Gen. Sts. c. 131, §§ 13, 14, 15, 16, the common law was greatly changed. It was changed still more by St. 1870, c. 393, which was substantially re-enacted in Pub. Sts. c. 169, §§ 18 *et seq.*, and in R. L. c. 175, §§ 20 *et seq.* It is now provided that "Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court, or before a person who has authority to receive evidence, except as follows: First, Neither husband nor wife shall testify as to private conversations with each other. Second, Neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other." R. L. c. 175, § 20. The effect of

these provisions is to render every person competent to testify except that husband and wife cannot testify to private conversations or be compelled to testify in criminal proceedings against each other. There is nothing which prevents a husband or wife from testifying against the other in criminal proceedings if the one testifying is willing to do so. The competency of the one testifying in such a case does not depend on the consent of the other. The only limitation is that the husband or the wife cannot be compelled to testify, and cannot testify to private conversations. The case of *Kelly v. Drew*, *ubi supra*, relied on by the defendant, arose under the General Statutes, and consequently is not applicable to the case before us. The statutes cited from other States differ materially from our own, and do not affect its construction.

*Exceptions overruled.*

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185	325
193	194
193	587

GEORGE C. CORCORAN vs. CITY OF BOSTON.

Suffolk. November 19, 1903. — March 31, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Tax, Exemption. Commonwealth. Vendor and Purchaser.*

Under R. L. c. 12, § 5, cl. 2, land of the Commonwealth, for which the Commonwealth has given a bond for a deed, in possession of the obligee who will become entitled to a deed on payment of the purchase money and who has erected buildings upon the land and is carrying on business there, is exempt from taxation.

MORTON, J. This is a petition under R. L. c. 12, § 78, for the abatement of a tax assessed to the petitioner as of May 1, 1902, by the assessors of Boston, for a parcel of land in South Boston for which the petitioner had a bond for a deed from the Commonwealth,\* and on which prior to May 1, 1902, he had erected buildings and was carrying on business as a box manufacturer.

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\* The bond was executed in behalf of the Commonwealth by the harbor and land commissioners, and bound the Commonwealth to convey the land to the petitioner on his payment of the purchase money in accordance with its terms.

The petitioner paid the tax under protest. The case was heard by a judge of the Superior Court upon agreed facts with power to draw inferences, it being agreed that if the petitioner was not liable to be taxed for the land, judgment should be entered for him for the amount of the tax with interest. The judge found and ordered judgment for the petitioner; and the case is here on exceptions by the respondent to the refusal of the judge to give certain rulings that were requested and to the rulings and findings that were made.

We think that the rulings and the refusals to rule were right.

The statute expressly provides that "The property of the Commonwealth, except real estate of which the Commonwealth is in possession under a mortgage for condition broken" shall be exempt from taxation. R. L. c. 12, § 5, cl. 2. The language could not be plainer. The words "the property of the Commonwealth" mean the same as "all the property of the Commonwealth." And the fact that only one exception is made shows that no other exception could have been intended, and that a construction such as contended for by the respondent, namely, that the exemption extends only to property held by the Commonwealth for governmental purposes would be unwarranted. The property that was taxed is the property of the Commonwealth, notwithstanding the Commonwealth has contracted to sell it to the petitioner, and the petitioner is in possession, and the exemption attaches to it so long as it continues to be the property of the Commonwealth. The question now presented does not appear to have been passed upon in this State, but the plain implication of the language of the court in *Essex County v. Salem*, 153 Mass. 141, is that if there had been an exemption from taxation in the case of counties like that in the case of the property of the Commonwealth it would have been held that the property of the county was exempt from taxation whether actually devoted to public uses or not. The judge has found that the tax assessed to the petitioner was for the land described in the bond, and for the reasons given we are of opinion that the tax could not be legally assessed to him.

*Judgment affirmed.*

*S. M. Child*, for the respondent.

*C. E. Hellier*, for the petitioner.

MARGARET MEADE vs. BOSTON ELEVATED RAILWAY  
COMPANY.

Suffolk. November 20, 1903. — March 31, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Negligence, In subway station. Street Railway.*

In an action against a street railway company for personal injuries, it appeared, that the plaintiff had entered an open car of the defendant at a station of the subway in Boston when seeing her daughter, ten years of age, unable to get a seat on the car, the plaintiff got upon the running board for the purpose of alighting, and, when she had one foot upon the station platform, the starter, who could have seen her if he had looked, blew his whistle, and the car started and threw the plaintiff down, causing the injuries. The plaintiff testified that while she was getting out she looked at the starter all the time. *Held*, that there was evidence of the plaintiff's due care and of the defendant's negligence.

TORT for personal injuries sustained when alighting from a car of the defendant in the Park Street station of the subway in Boston. Writ dated July 3, 1899.

In the Superior Court the case was tried before *Bond, J.*, who refused to order a verdict for the defendant. The jury returned a verdict for the plaintiff in the sum of \$800; and the defendant alleged exceptions.

The accident occurred on June 22, 1899, at about seven o'clock P. M. The plaintiff's daughter mentioned in the opinion was about ten years of age at the time of the accident. The plaintiff testified, that the starter blew his whistle when she was upon the running board of the car with one foot upon the station platform, and that the car then started and threw her down.

*W. B. Farr*, for the defendant.

*F. P. Garland*, for the plaintiff.

MORTON, J. This is an action of tort to recover damages for personal injuries sustained by the plaintiff while alighting from an open car of the defendant company at the Park Street station in the subway, Boston. At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused so to rule and submitted the case to the jury who returned a verdict for the

plaintiff. The case is here on the defendant's exceptions to the refusal of the judge to give the ruling thus asked for.

We think that the ruling was right. There was evidence tending to show that the plaintiff with two ladies and three children took a car of the defendant company at Arlington to go to Charlestown. On arriving at the Park Street station of the subway they alighted from the Arlington car and crossed the platform to take the Charlestown car. When that car came along the plaintiff got on to it about the middle. Her daughter went to get into the seat in front, but, finding it full, turned back to go into the seat where the plaintiff was, and the starter pulled her back. Thereupon the plaintiff attempted to get off the car and got as far as the running board when the car started, and threw her down causing the injuries complained of. There was testimony tending to show that the car was not in motion and that no signal had been given to start it when the plaintiff attempted to get off. It could not be said, therefore, as matter of law, that she was not in the exercise of due care in attempting to get off as she did. It was the duty of the starter to see that passengers attempting to alight had safely done so before he gave the signal to start the car. There was testimony tending to show that he gave the signal before she had alighted, and that he could have seen her if he had looked. The plaintiff testified that she looked at him all the time while she was getting out. We do not see, therefore, how it could have been ruled as matter of law that there was no evidence of negligence on the part of the defendant.

The question whether the accident happened as the plaintiff and her witnesses testified that it did, or as the defendant and its witnesses testified that it did, was plainly a question for the jury.

*Exceptions overruled.*

BENJAMIN F. SMITH & another *vs.* INHABITANTS OF  
STOUGHTON.

Middlesex. January 12, 1904. — March 31, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Municipal Corporations. Waterworks. Stoughton.*

185	329
189	264
185	329
192	463

Neither the water commissioners of a town as its agents, nor the town itself by a vote, can make a binding contract on behalf of the town to take water from an unauthorized source.

St. 1888, c. 240, created the Stoughton Water Company. By § 2 the corporation was authorized to take the waters of Knowles' Brook. By § 10 the town of Stoughton was authorized to purchase the franchise, corporate property and rights of the corporation. This it did. Thereafter the town made a contract in writing for a supply of water from wells to be driven below the sources of Knowles' Brook and independent of them. *Held*, that the contract was not binding on the town, because it provided for the construction of waterworks in connection with a supply which the town had no legal authority to use. *Stoughton v. Paul*, 173 Mass. 148, explained.

CONTRACT against the town of Stoughton for an alleged breach of a contract in writing. Writ dated May 19, 1899.

At the trial in the Superior Court before *Aiken, J.*, the jury returned a verdict for the plaintiffs in the sum of \$14,126.53; and the defendant alleged exceptions.

The contract sued upon was as follows:

"This indenture, made in duplicate, this twenty-fourth day of November, 1897, by and between Benjamin F. Smith and Charles G. Smith, both of Somerville, in the County of Middlesex, co-partners doing business as B. F. Smith & Brother, party of the first part, and the town of Stoughton through its board of water commissioners, duly qualified and authorized by law to act in the premises, party of the second part: — Witnesseth,

"1. Said party of the first part, in consideration of the mutual promises contained in this instrument, hereby agree to supply the town of Stoughton, with a driven-well system of waterworks, which will yield an average of one million or more gallons every day of twenty-four hours.

"2. The proposed location of this system is on the Lincoln Farm, so called, near the old dam, known as Pine Pond Dam,



near the head of Lincoln Pond, in the town of Stoughton, and in putting in the system, the suction main pipes shall not extend beyond the boundary line of said Lincoln Farm.

"3. The said party of the first part agrees to drive a sufficient number of either two and one-half inch or larger pipes, driven to a proper depth, using their own judgment as to the number, size and exact location of the wells to be made, in order to secure an average of one million gallons, or more, of water per day.

"4. Said party of the first part further agrees to do all the work, furnish all the material of every kind, and bear all the expenses of freight, transportation and for other purposes in connection with the putting in of said system, in the following manner and with the following specifications, to wit:—"

[Here followed the specifications.]

"11. After the party of the first part has driven and connected a sufficient number of wells, which in their judgment will yield an average of one million or more gallons of water per day of twenty-four hours, and shall have satisfied themselves, by pumping or other tests thereof, they shall then and thereafter pursue the work with all reasonable diligence.

"12. It is agreed that the final test shall be made after the new pumping station is built, and the pumps and boilers installed. Said final test shall be for a period not exceeding thirty successive days of twenty-four hours each. If at said final test, which shall be conducted under supervision of the party of the first part, and a representative of said town, and the fuel and one half the labor for which shall be furnished by said town, the yield of water of said system shall prove to be one million gallons or more per day of twenty-four hours, the town shall pay within ten days thereafter to the party of the first part the sum of twenty-eight thousand dollars (\$28,000).

"13. Said party of the second part hereby agree that upon the performance of the agreement of said party of the first part, hereinbefore set forth, and within ten days from the final test aforesaid, to pay to the said party of the first part, the sum of twenty-eight thousand dollars (\$28,000).

"14. The said party of the first part agrees that it will indemnify and save harmless the said town from all suits or actions, of every name and description, brought against the said town for

or on account of any injuries or damages received or sustained by any person or persons by or from the party of the first part, its servants or agents, in the construction of said work, or by or in consequence of any negligence in guarding the same, or any improper materials used in its construction, or by or on account of any act or omission of the said party of the first part or its agents, and to give to said party of the second part a bond in the penal sum of five thousand dollars to secure it upon this and their other agreements herein contained.

"15. The said party of the first part further agrees and guarantees that said system and plant shall during a period of one year from the commencement of said final test be capable of yielding an average of one million gallons of water or more per day of twenty-four hours, but this agreement and guarantee is upon the condition that they shall, in any failure to so yield, have and be given an ample opportunity to produce such yield by such additions to, or changes in said plant and system as shall to them seem necessary and advisable.

"In witness whereof the said Benjamin F. Smith and Charles G. Smith have hereto set their hands and seals, and the said town of Stoughton has signed and sealed these presents by Abram C. Paul, George F. Walker and George A. Wales, its board of water commissioners, hereto duly authorized this twenty-fourth day of November, one thousand eight hundred and ninety-seven."

[Here followed the signatures of the parties under seal as indicated in the foregoing paragraph.]

*T. E. Grover*, for the defendant.

*O. A. Marden*, for the plaintiffs.

KNOWLTON, C. J. This is an action to recover damages for a refusal of the defendant to permit the plaintiffs to perform a contract in writing to put in certain wells and construct a system of waterworks for the defendant. The primary question is, whether the contract relied on, in its application to the facts, and to the contemplated mode, and the only possible mode, of performing it, was one that the defendant had a legal right to make; or, to put it in another form, whether the contract was possible of performance by the plaintiffs, if the mode of performance was restricted to that which was within the legal rights of the defendant.

The only source for the supply of water from which the town was authorized to draw, at the place mentioned in the contract, was Knowles' Brook. The method prescribed by the contract was by driving wells, each consisting of a two and one half inch iron pipe, and connecting them together by pipes to which a pump was to be attached. These wells were twenty-five or thirty or more feet deep, and in boring them it appeared that, several feet below the surface, there was a stratum of fine sand, several feet in thickness, which was nearly but not entirely impervious to water. Below this stratum there was a body of loose coarse gravel, which, according to the contention of the plaintiffs, contained a large supply of water. The plaintiffs' witnesses testified that the water in this gravel came from a considerable distance, and being confined by this stratum, could not find its way, except in a very small degree, into the brook, and that the water gathered from the apparent watershed of Knowles' Brook was not a measure of the quantity that could be obtained from that locality. The water from all these wells flowed over their tops, and from one of them, when a covering was put on leaving a small orifice, the water spouted up five or more feet. The general contention of the plaintiffs was that there was an actual watershed of from three to six square miles, exclusive of the apparent watershed of Knowles' Brook, from which the water in this gravel was gathered, a large part of which could be reached by wells driven at the place prescribed in the contract. On the question whether it would have been possible for the plaintiffs to perform their contract, which called for a guaranteed supply of one million gallons of water per day throughout the entire year, the defendant objected to any evidence "that did not tend to show that the quantity of water called for . . . could be obtained from Knowles' Brook, or other sources from which the town was authorized to take water, or which would naturally find its way into said brook or such other sources, but the court overruled the defendant's objections, and the defendant excepted." The plaintiffs' recovery was had upon the theory that this contract authorized the taking of water which had no connection with Knowles' Brook, but which came underground in large quantities from long distances, and which, by reason of the subterranean geological formation, could be drawn to the surface

there by these wells. Knowles' Brook flowed through a part of the farm owned by the defendant, on which the wells were to be put, and it had its origin there; but the apparent watershed pertaining to it was only about three quarters or seven eighths of a square mile. The defendant's farm contained one hundred and thirty-three acres, some portions of which were a long distance from Knowles' Brook. The jury were instructed that, under the contract, the plaintiffs might procure water anywhere within the boundaries of the farm.

The Stoughton Water Company was organized under the St. 1886, c. 240, for the purpose of supplying the inhabitants of the town of Stoughton with water. It was authorized to take water by purchase or otherwise, from certain specified sources, one of which was Knowles' Brook. It was important to private owners, as well as to the public, that its rights, in reference to the sources from which it might draw water, should be defined and limited. Accordingly, its franchise gave it the rights mentioned and no others. As a corporation it had no powers but those given by its charter, and it could not take water and sell it to the inhabitants, either by purchasing lands and sinking wells, or otherwise, except from the authorized sources. See *Bailey v. Woburn*, 126 Mass. 416, 418; *Forbell v. New York*, 164 N. Y. 522; *Bassett v. Salisbury Manuf. Co.* 43 N. H. 569. If it had attempted to do so, its act would have been *ultra vires*, and might have been prohibited in the interests of the Commonwealth, or by a private person who was injuriously affected by it. The defendant was authorized by the statute to purchase the franchise and rights of this corporation, and it exercised this authority. It succeeded to the corporation's rights and no others. It is limited to the same sources for its water supply as the corporation was. The only source of supply to which this contract relates, that can be used by the town, is Knowles' Brook.

As against ordinary corporations, there are equitable limitations upon the defence of *ultra vires* to actions upon contracts partly or wholly executed. See *Nims v. Mount Hermon Boys' School*, 160 Mass. 177, and cases there cited. Whether this defence could be availed of effectually in the present case, if the town had not purchased the franchise and the original corporation were in the place of the present defendant, it is unnecessary

to decide. There are additional considerations affecting suits against towns; a contract not authorized by law is not binding upon a town or its taxpayers, and the courts will not enforce it. *Parsons v. Goshen*, 11 Pick. 396. *Minot v. West Roxbury*, 112 Mass. 1. *Lowell Five Cents Savings Bank v. Winchester*, 8 Allen, 109. *Allen v. Taunton*, 19 Pick. 485, 487. *Anthony v. Adams*, 1 Met. 284, 286. *Claflin v. Hopkinton*, 4 Gray, 502, 504. *Hood v. Mayor & Aldermen of Lynn*, 1 Allen, 103, 105. *Agawam National Bank v. South Hadley*, 128 Mass. 503, 505. *Lemon v. Newton*, 134 Mass. 476, 479. Neither the water commissioners as agents for the town, nor the town itself by a vote, could subject the taxpayers to a liability under a contract to take water from an unauthorized source.

The plaintiffs do not deny this proposition, but they rest their principal contention upon the decision in *Stoughton v. Paul*, 173 Mass. 148, which they treat as an adjudication conclusive in their favor in this case. We do not so consider it. That was a suit in equity to set aside the conveyance of the farm to the town, and this contract was introduced incidentally, as dependent for its validity upon the ownership of the farm. It was decided that the votes of the town did not limit the authority of the water commissioners. It was assumed, upon the record then before the court, that the purchase of the farm was with reference to taking and using the waters of Knowles' Brook. The single sentence, in the report of the finding, in reference to intercepting other subterranean waters as well as those flowing into Knowles' Brook, and the evidence on that subject, were not introduced as showing the principal object of the purchase. The purchase of the large tract was justified on the ground that it was thought necessary for the preservation and purity of the sources of water supply, and taking the waters of Knowles' Brook by interception and percolation was held to be permissible. In the opinion it is said that "The only question is whether the commissioners had authority to buy the land," and, from the beginning to the end of the opinion, it contains no reference to the contract now before the court. The validity of the present contract, in reference to the questions now raised, was not in issue, and a refusal of an injunction by a dismissal of the bill involved nothing as to the defences to the contract which might be set up in an action at

law afterwards. There was no jurisdiction in equity to enjoin proceedings under the contract on the grounds now relied on by the defendant. In reference to these matters the remedy at law was complete and adequate. Neither as a part of the substance of the suit then tried between the parties, nor collaterally, was there any adjudication of the questions now before the court. An adjudication as to the purchase of the land was not an adjudication as to this contract, subsequently made.

Because the contract was for the construction of waterworks in connection with a supply which the town had no legal authority to use, and because performance of the contract was impossible within limits legally permissible to the parties, the plaintiffs are not entitled to damages for the defendant's refusal to perform it.

*Exceptions sustained.*

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WILLIAM C. HEBB vs. THOMAS C. WELSH & trustee.

Suffolk. January 12, 1904. — March 31, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

185	335
192	'202
192	'353
185	335
194	'96
194	'199

*Evidence, Extrinsic affecting writings. Contract. Damages.*

In an action for an alleged breach of a contract in writing, to build two houses and a stable for the plaintiff, by the defendant's failure to put a soil pipe in the stable, oral evidence is admissible to show the meaning of the words "all the plumbing work on . . . one stable . . . the work to be . . . accepted by the plumbing inspectors of the city of Boston", and for this purpose the plaintiff may introduce evidence of conversations between himself and the defendant at and before the time of signing the contract, in which the various items including the plumbing of the stable were discussed in fixing the contract price, and evidence of what was necessary to be done to make the plumbing acceptable to the inspectors.

In an action of contract for the failure of the defendant to complete a building which he agreed to construct for the plaintiff, the damages which the plaintiff is entitled to recover are measured by the cost of the labor and materials necessary to complete the designated work which the defendant has left unfinished.

BRALEY, J. This is an action of contract to recover damages by reason of the failure of the defendant to carry out and perform an agreement in writing by which he undertook "to do all the plumbing work on two houses and one stable . . . according

to the plans and specifications . . . the work to be completed in a substantial and thorough manner, accepted by the plumbing inspectors of the City of Boston, and to the satisfaction of the said W. C. Hebb."

The defendant failed and refused to put in a soil pipe in the stable, and make the necessary connections, contending that this work was not required under the contract and specifications.

At the trial in the Superior Court, without a jury, this contention was not sustained, and he was found liable in damages by reason of his failure to perform the contract, and under his exceptions this raises the principal question in the case.

The rule invoked by the defendant that parol evidence is not admissible to vary the terms of a written contract is well settled. *St. Louis Perpetual Ins. Co. v. Homer*, 9 Met. 39, 40. But it does not apply when the language used is ambiguous by reason of unexpressed terms, and resort must be had to extrinsic evidence to determine the meaning and extent of the language employed by the contracting parties. Such evidence is admissible not to vary what is written, but to complete the instrument. *Sargent v. Adams*, 3 Gray, 72. *Stoops v. Smith*, 100 Mass. 63, 66. *Keller v. Webb*, 125 Mass. 88. *New England Dressed Meat & Wool Co. v. Standard Worsted Co.* 165 Mass. 328, 332.

In the contract under consideration the specifications for the stable, among other things, referred to a "drain for soil pipe to cesspool", and "lay a 6-inch Akron drain pipe from soil pipe to cesspool", but contained no requirement that a soil pipe should be put in the stable. At the trial the defendant contended that under it he had not contracted to put in a soil pipe, and resort must be had to the meaning of the words "all the plumbing work on . . . one stable . . . work to be . . . accepted by the plumbing inspectors of the City of Boston" to ascertain if his contention can be supported.

In order to determine what was the intention of the parties, the conversation of the plaintiff with the defendant at and before the signing of the contract, in which the various items of work were discussed, including the plumbing in the stable, in order to fix the contract price, was competent, as well as evidence of what was necessary to be done in order that the plumbing might be "accepted by the plumbing inspectors of the City of Boston." *Keller v. Webb*, *ubi supra*.

This testimony did not contradict any of the terms of the writing, but only showed in detail what was included under the general expressions used of "all plumbing," and that a soil pipe would be required in the stable before such plumbing would be acceptable to the inspectors. *New England Dressed Meat & Wool Co. v. Standard Worsted Co.*, *ubi supra*. *Alvord v. Cook*, 174 Mass. 120.

When the defendant declined to carry out the contract as proved, the plaintiff had a legal right to recover compensation for all damages he had suffered. Such damages would be measured by the cost of labor and materials necessary to finish the designated work, and which the defendant had failed to perform. *Olds v. Mapes-Reeve Construction Co.* 177 Mass. 41, 43. *National Machine & Tool Co. v. Standard Shoe Machinery Co.* 181 Mass. 275, 278.

All the evidence is not reported, but enough appears in the bill of exceptions to make it apparent that this was the rule of law followed at the trial.

*Exceptions overruled.*

*J. M. Maloney*, for the defendant.

*W. Keyes*, for the plaintiff.

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JAMES W. TOBIN vs. CENTRAL VERMONT RAILWAY  
COMPANY.

Suffolk. January 20, 1904. — March 31, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Railroad. Receiver. Jurisdiction.*

The receivers of an insolvent railroad corporation, under a decree of court, sold and conveyed all the property in their hands to a new corporation formed for the purpose, the decree providing that the purchaser should take the railroad property "subject to the lien, of any and all debts, obligations and liabilities, of the receivers." A fireman, injured while employed on a locomotive engine operated by the receivers, sued the new company for his injuries. The receivers had been discharged without having recognized the plaintiff's claim, and no permission to sue the receivers had been given by the court by which they were



appointed. *Held*, that the plaintiff had no cause of action in tort or contract against the defendant, and that if he had any equitable right to reach and apply in satisfaction of his claim property which had come to the defendant from the receivers, this court would not assume jurisdiction of it, but he must resort to the court which administered the property and by whose decree the sale to the new company was made and confirmed.

TORT OR CONTRACT, with five counts, the substance of the allegations being stated in the opinion. Writ dated April 9, 1901.

The defendant demurred to the plaintiff's declaration as amended. The Superior Court sustained the demurrer and gave judgment for the defendant. The plaintiff appealed.

*S. A. Fuller*, (*W. E. Bowden* with him,) for the plaintiff.

*E. R. Thayer*, (*J. F. Curtis* with him,) for the defendant.

BRALEY, J. In a declaration that by amendment finally contained five counts the plaintiff seeks to hold the defendant liable "in an action of tort or contract, it being doubtful to which of these classes the cause of action belongs."

The substantial allegations admitted by the demurrer state that the plaintiff, while in the employment of receivers duly appointed by the Circuit Court of the United States for the District of Vermont to take possession of and operate the line of railroad owned and controlled by the Central Vermont Railroad Company, sustained personal injuries when acting as a fireman on one of the locomotive engines then in use.

Afterwards, under a decree of the court, the receivers sold the railroad, with its equipment and property, to the defendant, and the sale was subsequently affirmed. In the decree, among other directions, it was provided, that "on confirmation of such sale, the purchaser or purchasers shall take title to the railroad and property so purchased, subject to the lien of any and all debts, obligations and liabilities of the receivers, heretofore or hereafter lawfully incurred by or under the authority of the court, or arising out of the operation of such railroad by the receivers, and subject also to the right of this court to compel payment of the purchase price in the manner hereinbefore provided."

At the time the sale was made and the title passed, the earnings from the operation of the road while in the hands of the receivers, and which had been expended by them in its equip-

ment and improvement, amounted to a larger sum than the damages demanded in this action.

No averment is made that permission to bring suit had been granted by the court having jurisdiction of the property, and by whose decree it had been sold, and it further appears that the receivers have been discharged, without having recognized or settled the plaintiff's claim.

In order to maintain an action of tort, the plaintiff must prove a wrongful act by the defendant, from which he has suffered damages to his person, but the negligence of which he complains, and that caused his injuries, was the alleged carelessness of the receivers, who at the time were acting for the court, and could not be considered as the agents or servants even of the Central Vermont Railroad Company, while it is too clear for discussion that no such relation arises between them and the defendant, a corporation organized apparently to take the property under the sale ordered by the court, and retaining the old corporate name, except that "railway" is substituted for "railroad," and neither the old nor the new company can be held to have taken by inheritance their liability to the plaintiff. *Archambeau v. New York & New England Railroad*, 170 Mass. 272, 273.

Their discharge by the court, of which they were officers, and under whose appointment they acted, relieves them from all personal liability of the nature described, and no action at law can now be maintained against them by the plaintiff. *Archambeau v. Platt*, 173 Mass. 249.

He is therefore compelled to rely on an alleged contractual right, based on the conveyance made in conformity to the decree, in order to recover in an action of contract. But if the deed of the receivers is given the effect of a deed poll, by which the grantee assumes their obligations, and agrees to perform them, the plaintiff was not a party to the transaction, and, being a stranger to the conveyance, cannot in law claim under it. *Coffin v. Adams*, 131 Mass. 133. *New England Dredging Co. v. Rockport Granite Co.* 149 Mass. 381. *Creesy v. Willis*, 159 Mass. 249, 251. *Clare v. Hatch*, 180 Mass. 194.

All that the defendant undertook, and was called upon to carry out and perform, appears to have been expressed in the

deed, and no right of recovery can be founded on the fact that it bought a property which may have been increased in value under the management of the receivers.

If it be assumed, without deciding, that the plaintiff's construction of the phrase "all debts, obligations and liabilities of the receivers" is broad enough to include his cause of action, it does not appear that his claim has ever been recognized either as to liability or by any sum as liquidated damages. No relation arising out of any contract existed between the plaintiff and the receivers, and his right to recover, if at all, arose solely out of an alleged tort on their part. The purchase of the property by the defendant under these conditions, and the terms of the decree, and nothing more, are not sufficient to transform the tortious act into a right sounding in contract, or to raise an implied contract that in some manner the plaintiff is to be paid compensation for his injuries by the defendant. *Massachusetts General Hospital v. Fairbanks*, 129 Mass. 78. *Brooks v. Allen*, 146 Mass. 201, 202. *Borden v. Boardman*, 157 Mass. 410. See *Jesup v. Wabash, St. Louis & Pacific Railway*, 44 Fed. Rep. 663, 665.

The plaintiff, however, urges in support of his contention that in some form of action he can reach and apply the assets passed by the receivers to the defendant in satisfaction of his damages; that the decree of sale and conveyance transferred the property subject to the receivers' liability to him, or created an equitable lien in his favor, and that he has a remedy in equity, and suggests that an amendment, changing his action at law into a suit in equity, should be allowed in accordance with R. L. c. 159, § 9.

But the extent and nature of the obligation with which the property was to be charged, and the time and manner of payment, as well as the procedure to be used to determine and enforce such a right, were all within the jurisdiction and control of the court that administered the property and marshalled the assets of the corporation, and by whose decree the sale was made and confirmed. No other tribunal can so well interpret these decrees or pass on the rights and adjust the equities of the parties arising under them.

There is no imperative rule of law or of comity that requires

us to take jurisdiction of this litigation, which may well be remitted to the determination of the court under whose authority the original proceedings were begun, and where for this purpose they may be treated as still pending. *Howarth v. Lombard*, 175 Mass. 570, 573, 575. *Buck v. Colbath*, 8 Wall. 334, 341, 345. *Porter v. Sabin*, 149 U. S. 473, 479. *Byers v. McAuley*, 149 U. S. 608, 614.

*Judgment affirmed.*

BRIDGET ROTH *vs.* ROLLIN M. ADAMS & another.  
ARNOLD A. RAND & another, executors, *vs.* SAME.

Suffolk. January 27, 1904. — March 31, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Contract, Specialty, Consideration. Guaranty. Landlord and Tenant.*

A guaranty under seal of the performance of the covenants of a lease needs no consideration and is binding although executed after the lease was made.  
If a guaranty of the performance of the covenants of a lease contains no stipulation that the lessor shall obtain judgment against the lessee before demanding payment of the guarantor, such a requirement will not be implied.  
Under an absolute guaranty of the performance of the covenants of a lease the guarantor is entitled to no notice of the default of the lessee.  
A lessee of buildings, who remains in possession and use of them until the end of the term demised, cannot when sued for the rent set up eviction or a breach of the covenant for quiet enjoyment on the ground that the premises have been condemned by the board of health as dangerous and unfit for habitation.  
Where a lessor of real estate does not agree to make repairs, the lessee, in the absence of evidence of fraud or concealment, cannot set up the decay and dilapidation of the leased buildings in defence to an action for rent. Nor is such a defence open to a guarantor of the performance of the covenants of the lease.

TWO ACTIONS OF CONTRACT, for arrears of rent alleged to be due from the defendant Adams as lessee, and from the defendant Hall as guarantor under a writing indorsed on the lease to Adams, the second action being brought by the executors of the plaintiff in the first action to recover for rent alleged to have accrued subsequently to any sued for in the first action. Writs dated October 7, 1899.

At the trial in the Superior Court *Sheldon, J.* ruled, that, upon the pleadings and evidence, the plaintiffs could not main-

185	841
185	1855
185	1586
185	341
189	573

tain their actions against both defendants, but must elect which defendant they would proceed against, and the plaintiffs thereupon discontinued both actions as to the defendant Adams.

The jury found for the plaintiff against the defendant Hall in both cases, in the first case in the sum of \$943.57, and in the second case in the sum of \$1,153.96. The defendant Hall alleged exceptions, raising the questions considered in the opinion. The plaintiff also alleged exceptions to the ruling of the judge that the lessee and the guarantor could not be sued in the same action.

The demised premises were described in the lease as "the entire brick building numbered two hundred nine (209) and two hundred eleven (211) South Street, in said Boston, together with the yard and rights of way belonging thereto."

The defendants introduced evidence tending to show that the demised premises included a certain brick building numbered 209 and 211 on South Street, Boston, together with a wooden ell in the rear of the brick building, attached thereto and forming part thereof, and having an aperture in its outer wall for the placing of ice in the ice chest; that the demised premises also included a yard in the rear of the brick building, and an old wooden building in the rear of and connected with the ell which with the ell stood in the yard, and also included a right of way in a passageway adjoining the brick building leading from South Street to the yard.

The plaintiff introduced evidence tending to show that only the brick building was demised.

The lease contained, after the covenant to pay rent, the following covenant of the lessee: "and [the lessee] also will keep all and singular the said premises in such repair as the same are in at the commencement of said term, or may be put in by the said Lessor or her representatives during the continuance thereof; reasonable use and wear, and damage by accidental fire or other inevitable accidents only excepted."

The lease was dated June 1, 1897. The guaranty of the defendant Hall, indorsed on the lease, was as follows: "June , A. D. 1897. Know all men that in consideration of one dollar, to me paid by the within-named lessor and in further consideration of the execution by her of the within lease which she has

given this day at my request, I hereby guarantee to her and her heirs and assigns the punctual performance by the within-named lessee and his executors, administrators and assigns of all the within covenants and agreements on his or their part to be performed or observed. Witness my hand and seal, this date. C. S. Hall." [Seal.]

*H. F. Naphen* (*W. A. Buie* with him,) for the plaintiffs.

*J. W. Pickering*, for the defendant Hall, filed a brief.

BRADLEY, J. The short form of guaranty written on the lease follows the language of a similar contract construed in *Sartwell v. Humphrey*, 136 Mass. 396, and the nature of the undertaking of the defendants is clearly and precisely expressed.

Being an instrument under seal, a consideration is presumed and is sufficient to support it as a binding agreement whether executed concurrently with or at a time subsequent to the signing of the lease. *Hayes v. Kyle*, 8 Allen, 300, 301.

By its stipulations the punctual performance on the part of the lessee of the covenants of the lease was guaranteed.

It is not contended that the executors, or their testatrix in her lifetime, designedly allowed the rent to become in arrears in order to favor the lessee, the principal debtor, to the injury of the guarantor, and a failure by him to pay the rent reserved at the time when it became due and payable would be a breach of his covenant, and a cause of action would at once accrue to the lessor against the defendant.

No limitation of the nature now suggested by him is expressed in the contract, and while he might have made his promise to pay contingent on the failure of his principal to pay any judgment the lessor might recover if he failed to keep this covenant, it is a sufficient answer to say that he did not do so, but was content to make his liability unconditional and absolute.

If there was no express requirement in the contract of guaranty that the lessor should first obtain judgment for the rent against the lessee as a condition precedent to his being called upon to make payment, none is to be read into it by implication, and it must be construed like any written agreement, where the parties have seen fit clearly to state the extent of an obligation by which they are severally to be bound.

Under its terms it became the duty of the defendant to ascer-

tain whether the lessee had kept his covenants with the plaintiff or her representatives, and neither she nor they were required first to give notice of this default of the lessee before bringing suit against the defendant. *Welch v. Walsh*, 177 Mass. 555.

No discussion of the joinder of both as parties defendant in this case is called for, as the plaintiffs at the trial, under a ruling sufficiently favorable to the defendant and made at his request, were compelled to elect between them, and made their election to pursue him alone.

In the next question presented by the defendant's exceptions he contends that the evidence offered by him that the board of health had condemned a portion of the premises as dangerous and unfit for habitation was wrongly excluded, because such condemnation amounted to an eviction by the lessor, which would either suspend payment of the rent, or justify their abandonment by the lessee.

Independently of the facts that the tenant took the leasehold estate, whether it included the brick building alone or in addition the wooden building and ell, as he found it, that he agreed to keep the premises in repair, that no substantial change of condition had taken place during his tenancy, and that he left solely because his business had declined and trade had followed his former customers to other localities, it is not shown that the lessor or her representatives had interfered with the tenant's estate in such a manner as to exclude him from, or permanently deprive him of, its full use and enjoyment as it existed at the date of the demise. *Skally v. Shute*, 132 Mass. 367. *Smith v. McEnany*, 170 Mass. 26. If upon conflicting testimony the jury could have found that the wooden building and ell remained in the possession of the lessor, although she permitted them to fall into a state of decay to the personal annoyance of the lessee, this does not necessarily prove such an interference with his occupancy of the demised premises as to amount to either an eviction or a breach of the covenant for quiet enjoyment, at least where the tenant still continues in possession and use of them. *International Trust Co. v. Schumann*, 158 Mass. 287, 291. Besides, his offer of proof contained no attempt to show any fraud or concealment by the lessor of the condition of the estate at the date of the lease, and the tenant took the premises as he found

them, for there is no warranty implied in law on the part of the landlord that they are tenantable or even reasonably suitable for occupation, and the rule of *caveat emptor* applies. *Stevens v. Pierce*, 151 Mass. 207. *Bertie v. Flagg*, 161 Mass. 504.

But by the provisions of the lease the landlord entered into no contract to make any repairs that might be needed, or to remedy defects that might arise during the tenancy of the lessee, and unless such an agreement is found, the decay and dilapidation of the buildings would not be a defence to an action for the rent as it accrued. *Foster v. Peyser*, 9 Cush. 242, 246. *Welles v. Castles*, 3 Gray, 323, 326. *Szathmary v. Adams*, 166 Mass. 145.

Such a defence is equally ineffectual when urged by a guarantor, who, for the purpose of performing this covenant, stands in place of the tenant, and the collateral undertaking is as broad as the terms of the contract guaranteed. *Clark v. Gordon*, 121 Mass. 330. *Warren v. Lyons*, 152 Mass. 310.

This discussion of the principles of law involved in the case covers all that is necessary to be said, as the rulings requested and refused stated in different ways the legal propositions already considered.

No error of law appears, and as the plaintiff's exceptions were abandoned at the argument, if the defendant was held liable for the rent, we treat them as waived; and the order must be

*Exceptions overruled.*

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WALTER B. ROBINSON & others vs. WILLIAM NUTT, executor.

Middlesex. January 28, 1904. — March 31, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Contract, Unilateral, Consideration.*

An agreement in writing to pay to the sinking fund committee of a certain parish \$5 in each month for five years, in order to help in the payment of the debt of the parish, on condition that the whole amount of \$10,000 shall be in like manner subscribed or otherwise provided for, and other requirements be performed, is a formal offer which on performance of the conditions by the committee becomes binding, such performance being a good consideration for the subscriber's promise.



**CONTRACT** by the members of the sinking fund committee of the First Parish of Natick against the executor under the will of Maria Hayes, upon an agreement in writing signed by the defendant's testatrix. Writ dated May 18, 1903.

The Superior Court, upon an agreed statement of facts, gave judgment for the defendant. The plaintiffs appealed.

The contract sued upon was as follows :

"No. 9. Natick, Mass., April 16, 1900.

"In order to help in the payment of the debt of the First Parish of Natick, within five years from the first of April, A. D. 1900, in all amounting to about \$10,000 exclusive of the Ministerial Fund Debt so-called, I hereby agree to give and pay to the Sinking Fund Committee of said parish the sum of five dollars each month for five years from and after said first day of April, A. D. 1900; the first instalment to be paid on or before the first day of April, A. D. 1900; provided first that the whole amount of \$10,000 be in like manner subscribed or otherwise provided for; and secondly that my annual income does not during the time named materially and unexpectedly decrease. This obligation to be binding upon my heirs, executors, administrators and assigns.

"If on the first day of April, 1900, it shall appear that the current expenses of said parish for the year ending December 31, 1899, have not been met and fully paid, then no further sum under this agreement shall be payable until such current expenses are fully paid; and likewise, if upon the first of any subsequent April, it shall appear that the current expenses of the year ending the 31st of December next preceding have not been met and fully paid, then no further sum under this agreement shall be payable until such current expenses are fully paid.

"This agreement is made with the distinct understanding that the current expenses of the parish shall not be materially increased except in the case of an unavoidable necessity, and that no unusual current expense shall be incurred in behalf of said parish unless a sum amply sufficient shall first be obtained, or provided for to meet such expense.

"If after paying the above debt there shall remain a surplus in the hands of the Sinking Fund Committee, it shall be devoted to diminishing the Ministerial Fund Debt.

"Maria Hayes."

The following also appeared from the agreed statement of facts: Maria Hayes was not a member of the First Parish of Natick. She died on August 23, 1900, and on December 3, 1901, the defendant was appointed executor under her will. No payments were made on her subscription after the payment for the month of August, 1900. The total amount subscribed was \$11,203.55 by two hundred and eighty-nine different subscribers. Of this amount \$1,910.50 had been paid to the plaintiffs on May 1, 1900, and \$3,287.94 on August 1, 1900; and on May 1, 1903, there had been paid on the subscriptions \$6,717.85 in all, which amount was applied in reduction of the debt of the parish under the terms of the subscription.

The annual income of Maria Hayes did not at any time materially and unexpectedly decrease. The annual current expenses of the parish had been met and fully paid on or before the first day of April in each year, beginning with April, 1900, up to the first day of May, 1903. The current expenses of the parish had not been materially increased at any time since the paper was signed by Maria Hayes, and no unusual current expense had been incurred on behalf of the parish.

There would be a surplus in the hands of the sinking fund committee after paying the debt of the parish, providing that all the subscriptions were collected, but this surplus would not be sufficient wholly to pay the ministerial debt.

It was agreed that any inference of fact might be drawn which a jury could draw.

*W. R. Bigelow*, for the plaintiffs.

*W. Nutt*, executor, *pro se*, filed a brief.

BRALEY, J. The written agreement signed by the testatrix was an undertaking on her part by which she agreed to pay the sum of \$60 a year for the term of five years, if certain requirements were fulfilled by the plaintiffs, who were the standing committee of the First Parish of Natick.

From the agreed facts, on which the case is submitted, the defendant concedes that these terms have been met and fulfilled, upon a full performance of which the subscription of the testatrix was made contingent and payable, and in his written argument the executor now denies liability of the estate only on the ground that the undertaking must be considered as wholly

gratuitous, and therefore without any legal consideration to support it.

If the offer is considered as a promise made by her in common with others to aid a religious society in which she was apparently interested, although not a member, it cannot be supported, for it falls within the class of what are called mere gratuitous or benevolent proposals prompted by charitable or religious motives, of which the law will not require a performance. *Cottage Street Methodist Episcopal Church v. Kendall*, 121 Mass. 528.

The principal purpose was to raise a fund to pay the debt of the parish, to which she in common with others promised to contribute to the extent of the various subscriptions, and it becomes incumbent on the plaintiffs to go further, and they must, as persons to whom the promise was made, show an acceptance by them of her proposal and the use by them of the fund contributed by her and others for the object stated in the subscription.

Her subscription was really made in the form of a formal offer which, being accepted by the plaintiffs, became an agreement under which they entered upon the performance of the contemplated plan, by obtaining additional subscriptions from others, and as a result the combined pledges made up the full amount required. When they applied the money received from time to time in reduction of the debt of the parish, the object upon which her promise depended had been accomplished. *Williams College v. Danforth*, 12 Pick. 541.

But under the proposal the burden also rested on the plaintiffs, as one of the conditions, to show that the current expenses of the parish would not be materially increased except in case of unavoidable necessity, and that no unusual current expense should be incurred unless a sum amply sufficient to meet it had been first obtained or provided; and in order to receive the amount which she pledged, the plaintiffs were obliged to carry out this requirement for the period of five years. The agreed facts contain enough to show that this was done by them in reliance on, and in order to obtain, the contribution made by her, as the several payments became due.

A sufficient consideration to support the contract is found in the offer made and its acceptance, followed by a performance on

the part of the plaintiffs as promisees, who, in reliance on her promise, assumed and performed the imposed duties on which her subscription depended, including the obligation of keeping the current expenses of the parish within certain required limits. *Ladies' Collegiate Institute v. French*, 16 Gray, 196, 201. *Cottage Street Methodist Episcopal Church v. Kendall*, *ubi supra*. *Sherwin v. Fletcher*, 168 Mass. 413, 415. *Martin v. Meles*, 179 Mass. 114. *French v. Boston National Bank*, 179 Mass. 404, 408.

*Judgment for the plaintiffs.*

JOHN R. GRAHAM vs. JOSEPH MIDDLEBY, JR. & others.

Norfolk. January 29, 1904. — March 31, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Alteration of Instruments. Practice, Civil. Evidence, Burden of proof, Self serving statements. Contract, What constitutes, Specialty, Consideration. Bond. Damages. Guaranty.*

In an action on an instrument in writing, where the defence is set up that a material alteration was made in the instrument after execution, it is within the discretion of the presiding judge to permit the instrument to be read in evidence, after proof of execution, although it is typewritten and shows on its face that the letter "s" has been added to the word "contract" with a pen, there being evidence tending to show that more than one contract was referred to.

Where in an action on an instrument in writing the defence is set up that a material alteration was made in the instrument after execution, after the plaintiff has proved the execution of the instrument the burden is still upon him to establish the contract on which he has declared.

In an action on an instrument in writing, where it is apparent on inspection of the instrument that either before or after delivery there was an alteration that may have been material, *semble*, that the presiding judge in his discretion may require the plaintiff to offer some explanation of the alteration before permitting it to be read, although the signatures of the parties to be bound have been admitted or proved.

In an action on a bond purporting to guarantee the performance of two contracts annexed to the bond, where the defence is that only one of the contracts was so annexed or referred to, if the bond is typewritten and shows on its face that the letter "s" has been added to the word "contract" with a pen, and the defendants contend that this alteration was made after delivery, and there is evidence that the bond and the two contracts in question although separate were to be treated as one transaction, the issue in substance is whether the several papers constituting the contract shown by the bond were delivered to the plaintiff in the condition disclosed by each paper when offered in evidence.

185 849  
185 596

185 349  
f188 387  
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185 349  
191 218

185 349  
f192 122

185 349  
193 517  
f194 101  
c194 427

In an action on a bond purporting to guarantee the performance of two contracts annexed to the bond, where the defence is that only one of the contracts was so annexed or referred to, the defendants cannot put in evidence a conversation among themselves before the bond was executed, not communicated to the plaintiff, in which it was agreed that the bond was to guarantee the performance of only one of the contracts and not the other.

In an action on a bond purporting to guarantee the performance of two contracts of a corporation annexed to the bond, where the defence is that only one of the contracts was so annexed or referred to, if one of the defendants, who was the treasurer of the corporation, called as a witness by the plaintiff, has testified to the execution and delivery of the bond and contracts, he cannot be asked on cross-examination to testify to a statement made by him to another of the defendants, before the bonds and contracts were delivered to the plaintiff and when the plaintiff was not present, in regard to the subject matter of the contract covered by the guaranty of the bond.

The language of a request for an instruction, although correct, need not be followed by the presiding judge in giving the instruction in substance.

In an action on a bond purporting to guarantee the performance of certain contracts annexed to it, it does not matter that the contracts referred to were not annexed to the bond at the time of signing, if it appears that the bond and contracts formed one obligation and were to be executed and then fastened together and placed in the hands of an agent for delivery to the plaintiff.

An action on a bond, guaranteeing the performance of a contract, is for the penalty of the bond, and the amount of damages suffered by the breach of contract is not before the court until after judgment when application is made for an execution.

An instrument under seal is binding without a consideration.

In an action on a bond guaranteeing the performance of a contract by a corporation to return to the plaintiff the money paid by him for a patented storage battery if its use should be enjoined and the injunction should not be dissolved within sixty days, where it appears that the defendants were directors of the corporation, the plaintiff need not show that he gave notice to the defendants of the default of the corporation.

CONTRACT upon a bond signed by the five defendants, in the penal sum of \$6,000, the condition of which was that "if the Hatch Storage Battery Company shall in all respects perform and carry out its agreement with said Graham [the plaintiff] contained in the contracts to which this bond is annexed, then this obligation shall be void, otherwise it shall be and remain in full force and virtue." Writ dated August 15, 1901.

In the Superior Court the case was tried before *Sherman, J.*

The action was defended by the defendants Middleby, Edgcomb, Hatch and Davis, the defendant Clare not entering any appearance or making any defence. Clare was the treasurer of the Hatch Storage Battery Company and one of its directors. The other defendants were directors of that company.

The plaintiff brought this action for the benefit of the Quincy and Boston Street Railway Company, to which he had assigned all his interest and for whose benefit he made the contracts above referred to with the Hatch Storage Battery Company. He had paid \$6,000 to the battery company, which had been repaid to him by the railway company. One of the contracts alleged to have been referred to in the bond and annexed thereto was an agreement of the battery company to repay to the plaintiff any money paid by him, if the battery company was enjoined from selling the battery which it undertook to sell to the plaintiff and the injunction was not dissolved within sixty days. The battery company and the railway company had been enjoined from using the battery purchased by the plaintiff from the battery company and the injunction had not been dissolved within sixty days. The plaintiff had demanded the return of the \$6,000. The defendants contended that the word "contracts" in the condition of the bond had been changed from the word "contract" by the addition of an "s" after execution and delivery and that the contract above stated was not referred to or annexed.

The judge submitted to the jury the following questions, which were answered as stated below :

"1. Were the three papers,—(1) the contract for the machine, (2) the contract to defend the suit, and (3) the bond signed by the defendants,—fastened together at the time the bond was signed." A. "No."

"2. Were the three papers 1, 2, 3, all there at the time and place, when the bond was signed, and was it understood that they were to be fastened together by Mr. Clare, and by him delivered to Mr. Graham?" A. "Yes."

"3. Was the letter 's,' inserted in ink after the word 'contract,' put in before the bond was signed?" A. "Yes."

The jury returned a verdict for the plaintiff in the sum of \$6,550, of which \$550 was for interest. The defendants alleged exceptions, raising the questions stated by the court.

*A. M. Lyman*, for the defendants.

*Z. S. Arnold*, for the plaintiff.

**BRALEY, J.** By the terms of the bond, the defendants were held to the obligation that their principal should perform its agreements made with the plaintiff contained in two separate contracts of even date with its execution.

As the bond was typewritten any change or addition by letters in manuscript would be apparent on inspection, but it could not be said that the addition of a single letter to a word in a typewritten instrument is so unusual or extraordinary as to take it out of the common rule of practice that in such a case it is within the discretion of the trial judge, after proof of execution, to permit it to be read in evidence.

If the alteration was of an immaterial nature the integrity of the obligation would not be impaired, but if the change was such as to substantially vary the contract this would constitute a defence.

If the execution of the bond is proved, the burden does not change, but the defendants meet the evidence of the plaintiff by proof that the contract in evidence is not that put in suit, and in such a case the burden of proof remains on the plaintiff throughout the trial to prove the contract upon which he has declared. *Wilde v. Armsby*, 6 Cush. 314, 318. *Ely v. Ely*, 6 Gray, 439. *Lincoln v. Lincoln*, 12 Gray, 45. *Ives v. Farmers' Bank*, 2 Allen, 236. *Wilton v. Humphreys*, 176 Mass. 253, 257.

But in dealing with this exception the course pursued by the parties at the trial must be recognized. The ruling admitting the bond was not made alone on the view that, where a party offers a written instrument to support a contract set forth in the declaration, and on inspection it is apparent that either before or after delivery there may have been an alteration, the burden remains on the plaintiff to satisfy the jury that the contract offered was the one made by the defendant, and it may be put in evidence on proof of its execution without further explanation; nor was the ruling made upon the ground that there may not be cases where an inspection of the writing apparently shows such a material alteration, that it is then within the discretion of the judge presiding at the trial to require the plaintiff to offer some explanation of the alteration, before permitting it to be read even though the signatures of the parties to be bound may be admitted or proved.

But here there were three papers, the bond and two agreements, one to repay the plaintiff any money that might be paid by him to the Hatch Storage Company if it was enjoined from vending the storage battery which it claimed the right to make

and sell under certain patents held by it, the other referring to the assumption of the expense of any litigation connected with legal proceedings brought against the plaintiff for the use of the battery, but each bearing the same date and simultaneously delivered.

It was contended by the plaintiff that these papers in the form in which they appeared were fastened together and thus received by him, and the question presented and on which the judge ruled ought not to be separated from this aspect of the case, it apparently being understood that if the papers were delivered in this form there had not been any subsequent alteration.

Beyond the fact of an apparent change there was nothing to prove any alteration by him, while there was evidence that it was the understanding of the officers of the company, including the defendants, that the bond and contracts though separate were really to be treated as one transaction. So that the substantial issue was this, whether the several papers constituting the contract shown by the bond were left with the treasurer by the defendants to be by him delivered to the plaintiff in the condition disclosed by each paper when offered in evidence.

Their offer of proof of a conversation between themselves before the bond was signed when the conditions to be inserted were under discussion, in which it was understood that the only undertaking was an agreement to save the plaintiff harmless from the costs of impending litigation, whether treated as a declaration in their favor, and not communicated to the plaintiff, or put on the ground that as he had no knowledge of such a private understanding, he had a right to rely on the bond and contracts in the form in which they were delivered to him by the treasurer, whose general authority to act was apparently undisputed, was inadmissible. *Taft v. Dickinson*, 6 Allen, 553. *White v. Dugan*, 140 Mass. 18, 19.

The question excluded in the cross-examination of the treasurer of the company falls within a similar limitation. He had testified to the execution and delivery of the bond and contracts, and any statement made by him before they were handed to the plaintiff, and when the latter was not present, cannot be treated as evidence; for the statement alleged to have been made was in his own interest. Nor was his statement admissible to contra-



dict him as a witness, because his interpretation of the contractual rights of the parties had not been offered and clearly was irrelevant; *Carter v. Gregory*, 8 Pick. 165; *Whitney v. Houghton*, 125 Mass. 451; *Burns v. Stuart*, 168 Mass. 19; even if it might also be found that he entertained feelings of hostility towards one of the defendants. *Quigley v. Turner*, 150 Mass. 108.

The defendants strongly urge that these conversations were competent evidence to show that they did not execute the bond, under the decision made in *Smith v. Jagoe*, 172 Mass. 538. But the cases are different. In the case cited the plaintiff had executed a mortgage drafted on a printed form with blank spaces which were not filled in, and had given authority to the mortgagee to have it filled out by inserting words to cover a single article of personal property. This was done; but other chattels were also named, and having brought a writ of replevin for them he was allowed to prove against the defendant to whom the mortgage had been assigned that the articles named in the writ were not covered, as no authority had been given to include them in the mortgage. Here the defendants executed an instrument which at the time of signing under either view was completed, and no argument is open that it was signed and delivered in blank, or fraudulently procured by the plaintiff.

The question now presented is not one of authority to write a contract above the signatures of the parties to be bound, and which must be strictly followed, but whether the contract itself, at the time of signing, was fully expressed as to all of its terms, or has since been materially altered.

One of the principal arguments of the defendants on this part of the case relates to the refusal to give the eighth request, in which the fact of annexation at the time of execution is again joined with the rule that the burden of proof was on the plaintiff to show that the bond was signed by the defendants in the form in which it appeared. As we have already said, this stated the law correctly. But no particular or set form of words are recognized by which the principle is to be defined; any language that conveys to a jury the substance of the rule and its application is sufficient, and it is enough to say that the judge was not required to instruct in the language requested. *Norwood v. Somerville*, 159 Mass. 105, 112.

In the instructions given which presented the question in different ways, they were told that if the contract had been materially altered the defendants would not be liable, and they must have plainly understood that in order for the plaintiff to prevail he must satisfy them that the bond introduced in evidence was the same in all parts as when it was signed.

Whether the several papers were annexed at the time of signing, or were detached and separate, would not discharge the defendants as obligors if it was found that they understood that the bond and contracts formed one obligation, and were to be executed and then fastened together and delivered by the treasurer, who was one of their number. They could do this with their own hands, or by the hand of their agent as the jury have specially found. *Commonwealth v. White*, 123 Mass. 430, 434. *Greene v. Conant*, 151 Mass. 223, 225.

There remain for consideration the other rulings requested, all of which were refused.

Whatever may be the duty of a party who rescinds an executed contract to return anything of value he may have received under it, the express agreement of the company under which the plaintiff acted provided for a termination of the contract and repayment of the money if an injunction prevented the use of the battery. That such an injunction issued and was not dissolved within sixty days thereafter is not disputed, and the condition upon which the obligation of indemnity arose was broken.

But the suit being brought in the name of the obligee, the fact that this contract had been assigned furnished no defence. The action is on the bond to recover the penalty, not on the agreement to secure the performance of which it was given, and the amount of damages which he may be entitled to recover is not before us. R. L. c. 177, §§ 9, 10. *Austin v. Moore*, 7 Met. 116, 124.

Being a sealed instrument, a consideration was imported by the form of the undertaking. *Hayes v. Kyle*, 8 Allen, 300, 301. *Roth v. Adams*, ante, 341. Neither is it shown that, because more than sixty days elapsed after the injunction issued, and before notice was given to the company demanding repayment of the amount paid under the contract, conditions had changed, so that the defendants were compelled to assume a burden from which

they would have been relieved if the plaintiff had acted earlier or had made a demand on them for payment before bringing suit. Besides, they held the office of directors in the company, and must be presumed to have known of its financial condition as well as its title to the patent under which it manufactured the battery and sold it to the plaintiff. The corporation of which they were officers undertook to sell to him a storage battery for which he paid a large sum of money. Evidently its right to make and sell the battery under certain patents held by it was open to legal attack, and the agreement recognized this by the recitals contained in it. Their obligation matured when their principal failed to perform its contract, and no formal notice to them by the plaintiff was required of its default. *Watertown Ins. Co. v. Simmons*, 181 Mass. 85, 86. *Welch v. Walsh*, 177 Mass. 555.

This disposes of the various questions raised at the trial, and as no error of law appears the order must be,

*Exceptions overruled.*



## HENRY O. SAWYER & others vs. COMMONWEALTH.

Worcester. February 23, 1904. — March 31, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Metropolitan Water Supply Act. Damages. Evidence. Partnership.*

A report of commissioners appointed under St. 1895, c. 488, § 14, to determine the damages suffered by the owner of an established business on land in the town of West Boylston decreased in value by the carrying out of that act, is not expected to set forth the evidence with more fulness than is reasonably necessary properly to present such questions of law as are raised before the commissioners. In the present case the report presented everything necessary to an understanding of the questions involved.

On a petition under St. 1895, c. 488, § 14, to determine the damages suffered by the members of a firm owning an established business on land in the town of West Boylston decreased in value by the carrying out of that act, where it appeared that the commissioners had treated the business as one which was expected to continue, and which but for the enactment of the statute would have continued until the expiration of the partnership agreement, it was held that there was no error in the exclusion by the commissioners of the testimony of an expert actuary, offered by the petitioners, as to the expectation of life of the individual members of the firm. In case of the death of a partner the good will then existing would be a part of the partnership assets.

On a petition under St. 1895, c. 488, § 14, to determine the damages suffered by the owner on April 1, 1895, of an established business on land in the town of West Boylston decreased in value by the carrying out of that act, the damages should be based upon the business shown to exist on April 1, 1895, and should not be assessed as of the time of the passage of the act or of the filing of the taking of the water.

The provision of § 14 of the metropolitan water supply act, St. 1895, c. 488, that in the assessment of damages thereunder "interest may be included in such damages and in such value at such rate and for such time as the commission may deem just and equitable", applies to the assessment of damages for decrease in the value of a business as well as to other assessments under that section.

On a petition to determine the damages suffered by the members of a partnership owning an established business on land in the town of West Boylston decreased in value by the carrying out of the metropolitan water supply act, such sums as were allowed to the partners as a reasonable compensation for services rendered in the business should be deducted in determining the value of the business as a producer of income and in assessing damages for interference with it.

In assessing the value of a business, the net profits of the business for several years immediately previous are important evidence of the value of the good will, but they are not conclusive, as circumstances may have existed to make the profits more or less during those years than would be likely to be earned later.

On a petition under St. 1895, c. 488, to determine the damages suffered by the members of a partnership owning an established business on land in the town of West Boylston decreased in value by the carrying out of that act, the income of the business after the passage of the act may be considered in determining the injury to the business caused by the act.

PETITION, filed in the Supreme Judicial Court for the county of Worcester on June 15, 1899, of copartners doing business under the name of H. O. Sawyer and Company, alleging that on April 1, 1895, the petitioners owned an established business of dealers in general merchandise and of furnishing undertakers, on land in the town of West Boylston, and that their business had been decreased in value and destroyed by the carrying out of St. 1895, c. 488, and praying for the determination of their damages.

In a decision reported in 178 Mass. 267, it was decided that a petition to the Superior Court relating to the subject matter of this petition was dismissed rightly. Upon the present petition this court held, in a decision reported in 182 Mass. 245, that the petitioners, being dissatisfied with the determination of damages made by the commissioners appointed by the court, had no right to a trial by jury, not coming within the provisions of § 15 of St. 1895, c. 488. That decision by the terms of the reservation was made subject to the right of the petitioners, if unsuccessful in their claim for a jury, to be heard later upon a motion to

recommit the report of the commissioners, and the right of the Commonwealth to be heard upon a motion for the acceptance of that report.

The case came on to be heard upon these motions before *Hammond, J.*, who, by agreement of parties, reserved it for determination by the full court of the questions of law raised by the motions, such disposition to be made of the case as to the full court should seem meet.

*J. R. Thayer, A. P. Rugg & H. H. Thayer*, for the petitioners.

*R. A. Stewart*, Assistant Attorney General, for the Commonwealth.

KNOWLTON, C. J. The petitioners, as copartners, on the first day of April, 1895, owned and were carrying on in West Boylston an established business, namely, that of proprietors of a store and dealers in general merchandise. Their partnership agreement was to expire on January 21, 1899. They bring this petition under the St. 1895, c. 488, § 14, to recover damages for diminution in value of their business by the carrying out of the act to provide for a metropolitan water supply. The case was referred to commissioners under the above section, and it is reserved for this court upon the questions of law raised by a motion of the petitioners to recommit the report of the commissioners and a motion of the respondent for its acceptance.

The first contention of the petitioners is that the report should be recommitted because it fails to state with sufficient fulness the principles of law and the findings of fact on which the decision was founded.

Under the statute, a petition in a case of this kind is "for the determination of such damages," and the commission is to "determine the damage to and value of real estate, machinery and business, and from time to time report their determinations on the petitions of such owners to said court," and it is primarily the duty of the commissioners to decide all questions of law and fact and reach a conclusion as to the amount of damages. Ordinarily it is not their duty to report the evidence, nor their findings as to the particulars on which their conclusion is founded. In this respect there is ordinarily not so much occasion to go into detail as in the report of an auditor or a master in chancery, who is not expected to report the evidence unless by special or-

der of the court. See *Newell v. Chesley*, 122 Mass. 522; *Boston & Worcester Railroad v. Western Railroad*, 14 Gray, 253, 259; *Bowers v. Cutler*, 165 Mass. 441; *Butrick, petitioner, ante*, 107; *De las Casas, petitioner*, 178 Mass. 218; 180 Mass. 472. When a question of law is raised at a hearing before a commissioner, or an auditor, or a master, it is usually his duty to report the facts with sufficient fulness to enable the court properly to deal with the question; or, if he himself is in doubt about a question of law which enters into the result, he well may frame his report in a way to present it clearly to the court. *Parker v. Nickerson*, 137 Mass. 487, 493. But under the present statute, commissioners are not expected to report with more fulness than is reasonably necessary properly to present such questions of law as are raised before them.

The petitioners, at the hearing before the commissioners, made thirteen separate requests for rulings. Seven of these were given and three were refused. Two were given with modifications. The remaining one was practically covered by a ruling given, and it became immaterial. We are of opinion that the commissioners in their report presented everything necessary to an understanding of the questions, and that the motion to recommend it should be overruled.

The evidence of an actuary as to the expectation of life of the three individual members of the firm does not appear to have been material. It is very seldom that facts are shown, in a case of this kind, which will make the testimony of an expert actuary important. *Copson v. New York, New Haven, & Hartford Railroad*, 171 Mass. 233. *Rooney v. New York, New Haven, & Hartford Railroad*, 173 Mass. 222. We have no doubt that the commissioners treated the business as one which was expected to continue, and which would have continued but for the enactment of the statute, until the expiration of the partnership agreement. If the partnership should be dissolved by the death of one of the partners, and if the business was valuable, the good will then existing would be a part of the partnership assets. There was no error in rejecting this evidence.

The first request for rulings was "That damages should be assessed as of the time, (a) of the passage of c. 488 of the act of 1895 or (b) of the filing of the taking of the water." The com-

missioners ruled "that damages should be based upon the business shown to exist on April 1st, 1895," but declined to make the ruling requested. We are of opinion that their ruling was right. The statute makes the existence of an established business on April 1, 1895, more than two months before the passage of the act, a condition precedent to recovery. In this way it is made impossible for one, after the passage of the act, or within two months before it, to establish a business for the purpose of subsequently claiming damages for an injury to it. The same reason applies to changes in the condition of the business by an increase in its magnitude or otherwise. The statute requires that the damage shall be assessed in reference to conditions existing on April 1, 1895. *Earle v. Commonwealth*, 180 Mass. 579. We interpret the request as referring to this subject, and not to the time when the right to petition for the assessment of damages accrued. If it were construed as referring to the latter subject, it would be of no consequence except as bearing upon the question how much interest should be allowed. On this point the statute expressly provides that "interest may be included in such damages and in such value at such rate and for such time as the commission may deem just and equitable." This provision is applicable to the assessment of damages for diminution in the value of a business as well as to other assessments under the same section. St. 1895, c. 488, § 14. The purpose of this provision is to leave the allowance of interest to considerations of equity, in reference to the time when the damage is actually suffered, rather than to make it dependent upon an arbitrary rule.

The commissioners rightly refused to rule "That in determining the net income of a business under this act, any sum or sums paid by way of salary to partners all of whom are giving all their time, attention and activity to it, should not be deducted." Such sums as are allowed to partners, as a reasonable compensation for services rendered in a business, are rightly deducted in determining the value of the business as a producer of income, and in assessing damages for interference with it.

The proposition "that the value of the good will of a business is ascertainable, as a matter of law, at so many years' purchase of the average annual net profits of the business prior to the tak-

ing," stated in the tenth request for a ruling, was erroneous. The net profits of the business for several years prior to the taking were important evidence as to the value of the good will, but for many reasons they might be more or less than would be likely to be earned later.

The request "That upon the evidence, the court must find a total destruction of the business initiated by the passage of the act," has not been considered in argument, except on the question whether the commissioners were bound to report the whole evidence. The twelfth ruling requested \* was given with a modification, namely, that the income of the business after the passage of the act might be considered in determining the injury to the business caused by the act. This modification was plainly right.

*Motion to recommit denied ; report accepted.*



JAMES A. LIND vs. ANNIE F. LIND.

Middlesex. March 1, 1904. — March 31, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

*Contempt. Practice, Civil.*

A motion to dismiss a petition for nullity of marriage, on the ground that the petitioner is in contempt for not complying with an order of court to pay a certain sum of money into court, is a proper way of bringing the fact of the contempt to the attention of the court, and need not be filed within the time limited for pleas in abatement.

PETITION, filed in the Superior Court March 16, 1901, for nullity of marriage.

The case came to this court on an appeal from an order dismissing the petition on two motions of the respondent. In the

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\* The ruling requested was as follows: "12. That the income of the business, or the employments of the partners, after the passage of the act, and between that time and the entire dissolution and abandonment of the business, the result of the operation of the act, cannot be considered in mitigation of the damages, not as an offset to, nor in diminution of such damages."



first motion it was alleged that the petitioner had been ordered, at the April sitting of the court in the year 1901, to pay into court for the benefit of the respondent an allowance exceeding taxable costs, and, though often requested so to do, had refused and neglected to comply with the order of the court, and by reason thereof was in contempt of court. This was filed February 17, 1903. The second motion was filed February 18, 1903, and stated that the respondent had procured a divorce from the petitioner on a libel filed before the petition for nullity was brought, and had obtained a decree *nisi*, in which proceeding the petitioner had taken exceptions; that those exceptions had been overruled on the sixteenth day of January then next preceding; that the libellee in the libel for a divorce (the petitioner in the petition for nullity) had in the suit for divorce "filed his motion to annul said decree *nisi* and for a rehearing, which motion was duly heard and dismissed; that said motion for a rehearing contained substantially all the allegations set forth in said James A.'s petition for nullity"; "that the decree of this Honorable Court passed by Mr. Justice Maynard upon said Annie's three motions filed case No. 2314, aforesaid, has never been complied with, and said James A. [the petitioner] is in default and is in contempt of this Honorable Court therein as well as in this case No. 3238." The prayer of the motion was that the petitioner be "adjudged to be in contempt" and "that his said petition be dismissed."

No extended order on these two motions appeared on the record before the court, but the following entries appeared on the "Docket Record": "May 7, Respondent's motion for allowance. May 13, \$30 ordered as allowance forthwith. 1903. February 17, Respondent's motion for contempt for non-payment of alimony under order of May 13. February 18, Respondent's motion to dismiss petition, and motion for contempt. February 19, Petition dismissed. February 28, Petitioner appeals. Law."

*J. G. Robinson*, for the petitioner, contended: 1. A motion to dismiss is only proper when the reasons for dismissal are apparent upon the record. 2. The respondent in this case had, by allowing two years to elapse after the filing of the petition, lost the right to file a motion to dismiss or a plea in abatement. 3. The facts set forth in the two motions to dismiss, if the re-

spondent desired to take advantage of them, should have been set up in a plea in abatement or an answer to the merits, thus giving the petitioner the right to demur or traverse the allegations. 4. The petitioner was entitled to a trial in which he should have an opportunity to prove or disprove the facts alleged in any answer either in abatement or to the merits of the case.

*G. M. Poland*, for the respondent, was not called upon.

LORING, J. A motion to dismiss a petition for nullity of marriage on the ground that the petitioner is in contempt for not complying with an order of the court directing him to pay \$30 into court for the expenses of the respondent, does not stand on the same footing as a motion to dismiss a common law writ for irregularities not going to the jurisdiction of the court, as the petitioner contends. Such a motion is the proper way of bringing the fact of the contempt to the attention of the court, and need not be filed within the time allowed for pleas in abatement.

The petitioner was entitled to be heard on this motion, and on the record before us we assume that he was heard.

*Judgment affirmed.*

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## CHICAGO TITLE AND TRUST COMPANY vs. F. DEWITT SMITH.

Hampshire. September 28, 1903. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Conflict of Laws. Judgment, Of court of other State. Practice, Civil, Exceptions.*

When one is sued here on a judgment obtained in another State, the defences open to him are to be determined by the law of this Commonwealth and not by the law of the State in which the judgment was obtained.

In an action here on a judgment obtained in another State the defendant may plead and prove in defence that he was not served with process and did not authorize an appearance in his behalf in the action in which the judgment was obtained, and the fact, that the defendant was a citizen of the State where the judgment was obtained when the action there was brought, is immaterial.

No exception lies to the exclusion by a presiding judge of a non-responsive answer of a witness to an interrogatory in a deposition, although the deposition was taken in behalf of the party objecting to the answer.

CONTRACT, on a judgment of the Superior Court for the county of Cook in the State of Illinois. Writ dated November 11, 1901.

In the Superior Court the case was tried before *Holmes, J.*, without a jury. He found for the defendant; and the plaintiff alleged exceptions.

The principal question raised by the exceptions is stated in the opinion. The other question related to the exclusion of a part of an answer of George Sawin, a lawyer of Chicago, examined by deposition in behalf of the defendant. The question was as follows: "Was said F. DeWitt Smith [the defendant] ever notified of the case of *Steele vs. the Chicago Paper Manufacturing Company*, or served with any process in said case as far as you know?" The answer was "Yes, sir. He was so served, as he told me." The defendant asked the judge to exclude so much of the deponent's answer as stated that the defendant told him that he had been served with process in the original bill on the ground that that part of the answer was not called for by the interrogatory. The judge ordered that part of the answer excluded, and the plaintiff excepted.

*J. A. Wainwright*, for the plaintiff.

*J. C. Hammond & H. P. Field*, for the defendant.

BARKER, J. The plaintiff, as receiver of the Chicago Paper Manufacturing Company, an Illinois corporation, seeks to recover upon an alleged judgment rendered in the Superior Court of Cook County, Illinois, on July 3, 1901, in an action begun on October 3, 1890, in favor of the plaintiff as such receiver, whereby that court adjudged and decreed that the plaintiff as such receiver recover of and from the defendant the sum of \$17,922.19, and that execution issue therefor against the defendant.

The present action was begun on November 11, 1901, and was heard by the court without a jury, with a finding for the defendant on July 29, 1903. A memorandum of the presiding judge filed on the same date shows that he found that the Illinois judgment was invalid because the defendant was not served with process in the Illinois suit and that the appearance entered for him was not authorized or ratified by him, so that the Illinois court had no jurisdiction to enter judgment against him therein, although he then was a citizen of Illinois. Before

the judgment was entered the defendant had removed from Illinois, and when the judgment was entered he was a resident of New York.

The case is here upon exceptions to the introduction of evidence by the defendant tending to show that he never was served with process in the Illinois suit and never knew of or authorized any appearance for himself therein. There is also an exception to the striking out of a part of a reply of a witness to a question put to him in taking his deposition.

1. The principal contention of the plaintiff is that, because the defendant was a citizen of Illinois he can contest the validity of the judgment only by proceedings for its review in the courts of the State where it was rendered. The record contains no evidence of the law of Illinois, and it well may be that by that law the defendant, if sued in Illinois upon the judgment, could defend by showing that he had not been served with process and had not entered or authorized an appearance. But if we assume that by the law of Illinois a judgment debtor in a judgment obtained there has no remedy when sued there upon the judgment but by proceedings to review or annul the judgment, when the same judgment debtor is sued here upon the judgment his defences here are not regulated by the law of Illinois but by the law of Massachusetts. When brought into our courts he has a right to have the same law administered which our courts give to our own citizens or to those of any other State.

When a judgment debtor is sued here upon a judgment the defences open to him depend upon the fact as to where the judgment was entered. If in our own courts the defence of want of service and that he never appeared is not open, and usually can be availed of only by proceedings to revise or annul the judgment. *Hendrick v. Whittemore*, 105 Mass. 23. *McCormick v. Fiske*, 138 Mass. 379. The only exception, made after the adoption of the fourteenth article of the Amendments of the Constitution of the United States, is that a non-resident of Massachusetts against whom a judgment *in personam* has been rendered here who neither was served personally with process nor appeared in the action in which the judgment was entered is not obliged when sued here upon the judgment to resort to a

writ of error to reverse it. *Néedham v. Thayer*, 147 Mass. 536. See *Eliot v. McCormick*, 144 Mass. 10.

But when the judgment sued on here is not a domestic judgment, and is one rendered in another State or jurisdiction, the defendant may plead and prove that he was not duly served with process and did not authorize an appearance in the action in which the judgment was entered. *Gilman v. Gilman*, 126 Mass. 26. *Wright v. Andrews*, 130 Mass. 149.

In *Finneran v. Leonard*, 7 Allen, 54, the judgment was a domestic one, and in *Engstrom v. Sherburne*, 137 Mass. 153, the defendant appeared in the Nevada court.

The defendant in the present instance is within our rule which governs whenever foreign judgments are sued on in our courts and the evidence excepted to was admitted rightly.

2. The part of the answer of the witness excluded under the plaintiff's exception was not responsive to the question. For that reason it was excluded rightly.

*Exceptions overruled.*

185	366
186	281

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PENNSYLVANIA IRON WORKS COMPANY *vs.* HYGEIAN ICE  
AND COLD STORAGE COMPANY.

Bristol. October 26, 1903. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Contract, Performance and breach. Sale, Acceptance. Evidence.*

The plaintiff, a manufacturer of and dealer in machinery, made a contract in writing with the defendant, a cold storage company, the substance of which was, that the plaintiff was to deliver on the premises of the defendant a twenty ton evaporating apparatus of a certain type for making ice, and within one month the defendant was to pay the plaintiff \$1,500, unless in the meantime it appeared that the apparatus had not a capacity of twenty tons, or unless the defendant notified the plaintiff that the apparatus did not accomplish the results guaranteed by the company from which the plaintiff had procured it and requested its removal. The plaintiff delivered the apparatus of twenty tons capacity upon the defendant's premises in the manner required by the contract, and the defendant kept and used it. The plaintiff sued for the \$1,500. *Held*, that, in view of the facts stated above, evidence offered to show that the defendant did not accept the apparatus was immaterial, *also*, that evidence, offered by the defendant, that the apparatus produced bad ice was immaterial, *also*, that evidence, that the defendant expressed

dissatisfaction and that efforts were made to improve the apparatus so that it would produce better ice, was immaterial, as the defendant did not within one month notify the plaintiff that the apparatus did not accomplish the results guaranteed by its maker and request its removal.

CONTRACT, on a contract in writing, with a count on an account annexed covering matters not included in the contract. Writ dated March 21, 1902.

At the trial in the Superior Court before *Lawton, J.*, the jury returned a verdict for the plaintiff in the sum of \$1,568 upon its liability under the contract; and the defendant alleged exceptions.

The contract declared upon was as follows :

“Memorandum of Agreement made and entered into this thirtieth day of March A. D. 1901.

“Whereas there is existing a contract between the Pennsylvania Iron Works Company, of the City of Philadelphia and State of Pennsylvania, hereinafter known as the Iron Works, and the Hygeian Ice & Cold Storage Company, of Fall River and State of Massachusetts, hereinafter known as the Hygeian Company, which contract bears date of April 28th, 1900, and wherein the Iron Works agrees to furnish, deliver and erect one Ice Making Plant in accordance with specifications attached and made a part of that agreement for a certain consideration; and further, the said Iron Works having so delivered and erected the Ice Plant, and having received from the Hygeian Co. a certain proportion of the contract price thereof, and in order to obtain final settlement of that account now due of Five Thousand Four Hundred and Twenty-five (\$5,425.00) Dollars:

“This Agreement Witnesseth; that the parties hereto do agree for themselves, successors and assigns, jointly and severally, and bind themselves to the covenants following:—

“The Iron Works will at its own cost and expense deliver on the premises and in the location required in the plant of the Hygeian Ice and Cold Storage Company, in the City of Fall River, Mass., one 20 ton Evaporating Apparatus of the ‘Lillie’ or other type of equal capacity, and that the Hygeian Company will in turn deliver on cars (less expense of rigging) free to the Iron Works all that portion of the plant, as installed by the Iron Works above mentioned therein and relating to the Distilling

Apparatus, and not required in the installation of the evaporating system herein provided for.

“Now Therefore for and in consideration of the fulfillment of the covenants of this Agreement, and the signing thereof on the part of the Iron Works and its delivery to the Hygeian Company, accompanied by a copy of agreement between the said Iron Works and the Sugar Apparatus Manufacturing Company, the said Hygeian Company upon its receipt agrees and does hereby agree to execute same in its behalf, and return to the Iron Works, together with cash in the sum of Three Thousand Nine Hundred and Twenty-five (\$3,925.00) Dollars, less whatever amount of vouchers the Hygeian Company may have paid, directly chargeable to the Iron Works, for advances made for its account for wages, materials, &c. during the installation of the plant; the sum of Fifteen Hundred (1,500) Dollars deducted from the above mentioned total amount to be retained by the Hygeian Co. in its possession until the Iron Works shall have delivered to the Hygeian Company in Fall River, Mass., the above mentioned evaporating apparatus; and, in one month from date of said delivery to the Hygeian Company, the said Hygeian Company will deliver in cash the above sum of \$1,500.00, and \$250.00 additional less the amount paid out by the Hygeian Company chargeable to the Iron Works under this Agreement, (the time of one month's grace herein allowed between delivery of the apparatus and payment of the cash being given that the Hygeian Company may have the opportunity of determining that the capacity of the apparatus is as stated, *i. e.* twenty tons,) unless the Hygeian Company within that time notifies the Iron Works that the apparatus has failed to accomplish the results guaranteed by the Sugar Apparatus Manufacturing Co., and requests its removal.

“On receipt of this contract, duly executed on behalf of the Hygeian Company and the amount in cash due, the Iron Works hereby agrees to immediately place its order for the apparatus herein provided for, and use its best efforts for the prompt execution of the order and delivery of the apparatus to the Hygeian Company.

“In Witness Whereof the Iron Works has caused its Treasurer to sign and seal these presents, and the Hygeian Company

has set its hand and seal this Thirtieth day of March A. D. 1901."

Here followed the signatures of the parties under seal and the signatures of witnesses.

*R. P. Borden*, for the defendant.

*J. W. Cummings & C. R. Cummings*, for the plaintiff.

MORTON, J. This is an action to recover money alleged to be due under a written contract and also upon an account annexed. At the trial it was agreed that the only matters in dispute were, first, the sum of \$1,500 alleged to be due under the written contract, second, a balance of \$68 also alleged to be due under the written contract, and, third, a claim made by the plaintiff on account of certain machinery which the defendant was to deliver to the plaintiff on the cars at Fall River. There was a verdict for the plaintiff, in part directed by the judge and in part upon matters submitted to the jury, and the case is here upon exceptions by the defendant to the exclusion of evidence that was offered and rejected, and to the refusal of the presiding judge to give certain instructions that were requested.

The case depends it seems to us upon the construction to be given to the written contract. There had been a previous contract between the plaintiff and the defendant, under which the plaintiff had delivered to and erected on the defendant's premises at Fall River an ice making plant, and for the purpose of settling and adjusting matters growing out of that contract, the contract in question was entered into. The plaintiff agreed to deliver on the defendant's premises in Fall River, and in the location required by its ice making plant, a twenty ton evaporating apparatus of the "Lillie" type, or of some other type of equal capacity, and the defendant agreed to deliver to the plaintiff on the cars at Fall River that portion of the plant previously installed which the "Lillie" apparatus superseded. The defendant also agreed to pay to the plaintiff in one month from the delivery the sum of \$1,500, unless, within that time, it notified the plaintiff that the apparatus had failed to accomplish the results guaranteed by the company which contracted with the plaintiff to furnish it, and requested its removal. This company was the Sugar Apparatus Manufacturing Company. The contract stated that the month between the delivery of the ap-



paratus and the payment of the \$1,500 was given in order that the defendant might have the opportunity to determine whether the capacity of the apparatus was twenty tons as called for by the contract. A copy of the contract between the plaintiff and the Sugar Apparatus Company was attached to the duplicate original of the contract between the plaintiff and the defendant furnished to the defendant, but was in no other way made a part of that contract, the only reference to it being that already mentioned. As we construe the contract between the plaintiff and the defendant, the plaintiff was to deliver on the premises of the defendant in Fall River, in the location required by the existing plant, a twenty ton evaporating apparatus of the "Lillie" or of some other equal type, and within one month after the delivery the defendant was to pay the plaintiff \$1,500, unless, in the meantime, it appeared that the apparatus had not a capacity of twenty tons, or unless the defendant notified the plaintiff that it did not accomplish the results guaranteed by the Sugar Apparatus Company, and requested its removal. The plaintiff did not guarantee that the apparatus would furnish merchantable ice free from impurities and odors, or that it would work satisfactorily in connection with the ice making plant already installed. Indeed it would seem from the correspondence that was put in without objection that the plaintiff did not believe that the "Lillie" apparatus would accomplish the results desired, and so informed the defendant, and that the defendant was content to take the risk. All that the plaintiff was required to do was to deliver the apparatus upon the defendant's premises in the location required and thereupon the defendant became bound to pay the plaintiff \$1,500 in one month, unless it turned out that the apparatus was not of twenty ton capacity, or unless the defendant notified the plaintiff that the apparatus failed to accomplish the results guaranteed by the sugar company, and requested its removal. It is conceded that the contract did not require the plaintiff to set up the apparatus. The uncontradicted evidence showed that the apparatus was delivered upon the premises of the defendant and in the location required, and that the defendant kept and used it, and that it was included in the property conveyed by the defendant when the plant was sold. In view of the uncontradicted evidence that it was deliv-

ered as required, evidence that it was not accepted was immaterial. There was no contention that it was not of twenty ton capacity, or that the defendant had delivered to the plaintiff the apparatus superseded by it. The fact, if it was a fact, which the defendant offered to show, that the apparatus produced bad ice was immaterial. If the defendant was dissatisfied with the apparatus, it was bound, under the contract, to notify the plaintiff within a month after the delivery and request its removal. There was nothing to show that it did so, or that those provisions of the contract were waived by the plaintiff, or that anything occurred to excuse the defendant from complying with them. It is true that the defendant expressed dissatisfaction, and that efforts were made to improve the apparatus so that it would produce better ice, but this fell far short of the notice and request required by the contract, or of establishing a waiver on the part of the plaintiff, or of furnishing a valid excuse on the part of the defendant for not complying with the provisions of the contract. Without attempting to review and consider here the various rulings and refusals to rule to which exceptions were taken, we deem it enough to say, that we discover no error in any of them or in the way in which the case was submitted to the jury.

*Exceptions overruled.*

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EUGENE G. MCSWEENEY & another vs. COMMONWEALTH.

185	371
h190	4534

Middlesex. November 17, 1903. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Metropolitan Park Commission. Damages. Deed. Easement.*

The provision of § 5 of the metropolitan park commission act, St. 1894, c. 288, that damages sustained by the taking of land or any right therein under the act shall be "assessed by a jury of the Superior Court in the same manner as is provided by law with respect to damages sustained by reason of the laying out of ways" refers only to the mode of procedure and not to the elements of damage for which recovery may be had.

Under § 5 of the metropolitan park act, St. 1894, c. 288, providing for the payment of all damages sustained by the taking of land or any right therein under the act, the owner of land not taken cannot recover for temporary injury to his land by the accumulation of water caused by the taking of adjoining land for a parkway.

One who gives a deed of land with full covenants of warranty cannot claim a reservation by implication of an easement of drainage through the granted land for the benefit of his remaining land.

The owner of land adjoining lower land which has been taken for a parkway under the metropolitan park commission act, St. 1894, c. 288, cannot recover for injuries to his land caused by a drain pipe which passed through his land without right being cut on the land taken, so that the sewage from houses above no longer being carried off by the drain has flowed into his cellar. His remedy would be to stop the drain where it entered his land.

LATHROP, J. This is a petition for the assessment of damages alleged to have been occasioned to the land of the petitioners in Everett by the acts of the metropolitan park commission in taking certain land and constructing a parkway thereon, under the St. of 1894, c. 288, and the St. of 1895, c. 450. At the close of the petitioners' evidence, the jury were directed to return a verdict for the respondent; and the case is before us on the petitioners' exceptions to this ruling.

No part of the petitioners' land was taken by the park commissioners, but a portion of the adjoining lot was taken up to within a few feet of the petitioners' boundary line. On the northerly side of the parkway the land slopes up gradually for some three hundred feet to Chelsea Street. During the work of construction of the parkway, an underground drain pipe running across the rear of the petitioners' land and the land taken was broken by the employees of the commission, within the limits of the land taken, and permanently obstructed.

The petitioners' land is situated on Ferry Street Extension, which runs from Chelsea Street down to the parkway, but is not connected therewith. The petitioners bought their land in October, 1892, from one Peters, who owned at the time either alone or jointly with one Hadley five and a half acres of land, of which the petitioners' land was a part. In 1890, Peters built a drain across his land, running from a point about one hundred feet below Chelsea Street down across the land afterwards sold to the petitioners and land afterwards sold by Peters and Hadley to one Bench in 1895. This drain emptied into a creek in the marsh below. The drain, Peters testified, was designed for the drainage of the houses which might afterwards be built on the land, and also to take the underground water from the springy soil near the beginning of the drain, and it was so constructed that rain water could get into it.

The drain was broken on May 31, 1901, and on the next day the petitioners' cellar was flooded to the depth of a foot and a half or more, and water remained in the cellar until July 15, 1901, when a connection was made with a sewer of the city of Everett, that had just been put through Ferry Street Extension. The water which came into the cellar was house sewage from eighteen families living between the petitioners' lot and Chelsea Street. The effect of the water was to injure the house, and the petitioners were obliged to take a room in another house for six or seven weeks. Since that time, whenever there is a heavy rain, surface water has come through the cellar wall into the cellar. This water came down Ferry Street Extension, and was accumulated near the parkway. At the time of the trial a drain was being built to take care of this surface water.

At the time the land was sold to the petitioners there was no other house on the five and a half acre lot. The plumbing of the petitioners' house was connected with the drain by Peters after the petitioners bought the land. The deed to the petitioners was a warranty deed in the usual form, and it contained no grant of an easement in the drain, nor any reservation of a right to Peters to drain the sewage or water from his remaining land through the petitioners' land.

The St. of 1894, c. 288, § 5, provides for the payment of "all damages sustained by any person or corporation by the taking of land, or any right therein." The additional provision that damages shall be "assessed by a jury of the Superior Court in the same manner as is provided by law with respect to damages sustained by reason of the laying out of ways" has reference only to the mode of procedure, and not to the elements of damage for which recovery may be had. *Hay v. Commonwealth*, 183 Mass. 294.

As no part of the petitioners' land was taken, we are of opinion that they cannot recover for the temporary injury done to their land by the accumulation of surface water caused by the parkway being at a higher grade than the foot of Ferry Street Extension. See *Lincoln v. Commonwealth*, 164 Mass. 368, 374; *Chelsea Dye House & Laundry Co. v. Commonwealth*, 164 Mass. 350, and cases cited.

The remaining question is whether the petitioners had an easement in the land taken for the maintenance of the drain.

There was no easement by grant in the land taken, nor was there any by prescription.

If the petitioners' land had any easement it was by implied grant; but easements by implied grant are those which are strictly necessary to the principal thing granted, and mere convenience is not enough. *Nichols v. Luce*, 24 Pick. 102. *Buss v. Dyer*, 125 Mass. 287. *Johnson v. Knapp*, 150 Mass. 267. *Cummings v. Perry*, 169 Mass. 150. In the case at bar there was no evidence that the drain was necessary.

At the time the conveyance was made to the petitioners, the drain was used only for the purpose of carrying off underground water from land above them, some distance from their lot. The petitioners do not contend that they have been injured by having the drainage from their house cut off temporarily, but they contend that they have been injured by the sewage from the houses that had been built above them, after the conveyance to them had been made, being cut off and coming into the cellar of their house. It is difficult to see upon what ground the petitioners can claim an easement in the land taken for the purpose of having the sewage of the houses above them pass through their land and that taken. The petitioners were not compelled to receive the drainage from the houses above them, unless it can be said that when Peters conveyed to them he impliedly reserved a right of drainage for his remaining land. But this cannot be said in view of the covenants of warranty and freedom from incumbrances in the deed to the petitioners. *Carbrey v. Willis*, 7 Allen, 364. *Adams v. Marshall*, 138 Mass. 228.

While Peters owned the entire lot of five and a half acres he could acquire no easement in the drain, and when he conveyed to the petitioners by a deed containing full covenants of warranty, both he and those claiming under him were estopped to claim any interest in the granted premises. *Carbrey v. Willis*, *ubi supra*. The petitioners therefore were not obliged to receive the sewage from the land above, and might have stopped up the drain where it entered on their land.

The order therefore must be,

*Exceptions overruled.*

*M. S. Holbrook*, (*M. Holbrook* with him,) for the petitioners.

*R. G. Dodge*, Assistant Attorney General, for the Commonwealth.

## RAFFAEL GUGLIELINO &amp; others vs. GEORGE A. CAHILL.

Suffolk. November 19, 1903. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Contract. Evidence.*

Where the execution of a contract in writing to perform certain work for a price named is in issue, the party relying on the contract may show by experts that the price named was a fair market price for the work, for the purpose of showing the probability of the execution of the contract.

LATHROP, J. This is an action on an account annexed for labor performed to the amount of \$364, less \$112 paid, leaving a balance due of \$252, for which amount, with interest, a verdict was returned.

At the trial in the Superior Court, there was evidence that the defendant was a contractor to build a school house, and that he sublet a portion of the work to a firm named Cullen Brothers, by whom the plaintiffs were employed to do some of the work.

One issue in the case was whether the plaintiffs signed a written agreement with Cullen Brothers to do the work for \$350, and an agreement was put in evidence purporting to be signed by the plaintiffs by their mark. The plaintiffs denied signing this agreement, and one of them testified that the price for which they agreed to do the work was \$700 and not \$350; that after he had been working some days, without receiving any pay from Cullen Brothers, he went to the defendant and said that unless he got some money the men would put on a lien, and that the defendant said that he did not want any liens on the work and would see that the men were paid.

The defendant testified that he did not make a new agreement with the plaintiffs; that one of them called on him for money, and that after seeing one of the Cullens he made certain payments to the plaintiffs, charging them to the account of Cullen Brothers; and that the plaintiff with whom he had the conversation told him that the price of the work in the contract with the Cullens was \$350. There was evidence that the plaintiffs did not fully complete the work.

The only exception in the case is the following: "The defendant offered to show by experts, duly qualified, that \$350 was a fair market price for the work called for by the written agreement." This evidence was offered on the question of the probability of the execution of the contract in manner and form as testified to in behalf of the defendant. This evidence was excluded.

We are of opinion that the evidence for the purpose for which it was offered should have been admitted. The question is fully covered by our previous decisions. *Bradbury v. Dwight*, 3 Met. 31. *Upton v. Winchester*, 106 Mass. 330. *Brewer v. Housatonic Railroad*, 107 Mass. 277. *Norris v. Spofford*, 127 Mass. 85. *Nickerson v. Spindell*, 164 Mass. 25, 27. *Copeland v. Brockton Street Railway*, 177 Mass. 186, 187.

*Exceptions sustained.*

*D. B. Ruggles*, for the defendant.

*C. E. Washburn & O. E. Kaine*, for the plaintiffs.

185	376
186	248
185	376
187	484

GEORGE F. CHILD & another, executors, *vs.* GEORGE F. CHILD & others.

Suffolk. December 10, 1903. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Devise and Legacy. Words, "Such of."*

In construing a will omitted words cannot be supplied unless it is plain from the words used what words were omitted. Thus if a testator provides that on the death of his widow the residue of his estate shall be distributed among "such of" a brother and two sisters and the children of a deceased sister, the court will not undertake to complete a sentence of limitation by conjecture.

A testator devised and bequeathed the residue of his estate to trustees in trust for the benefit of his wife during her life, and then to "pay over, transfer and convey" the trust estate "to and among such of my brother and sisters, L., S. and F., and the children of my sister M., deceased (said children of M. to take the parent's share by right of representation), and in case my said brother F., or either of my said sisters, or any of said children of M., deceased, above mentioned die in my lifetime, or before said trust shall terminate, leaving children, such children shall take the parent's share by right of representation." *Held*, that

the remainders were vested, and that the persons to whom the estate was to be distributed on the death of the testator's widow were to be ascertained as of the time of the testator's death.

BILL IN EQUITY, filed April 7, 1903, by the executors under the will of Samuel G. Child, late of Boston, praying that it might be decreed that Samuel G. Child at the time of his death had a vested interest in the trust created by article twelve of the will of James Guild, and that the sum of \$7,500, being the proceeds of the sale of such interest, should be paid to the plaintiffs as executors under the will of Samuel G. Child; also that the plaintiffs might be released and discharged from the agreement and bond mentioned below.

The case came on to be heard upon the bill and answer before *Morton, J.*, who, at the request of the parties, reserved it for determination by the full court, such decree to be entered as equity and justice might require.

The following facts appeared by the record :

James Guild by the twelfth article of his will devised and bequeathed the residue of his estate to trustees in trust (in the event which happened) to his wife for life, and then to "pay over, transfer and convey" the trust estate "to and among such of my brother and sisters, Louisa Guild, Sarah Ann Chandler and Frederic Guild, and the children of my sister Mary D. Child, deceased (said children of Mary D. to take the parent's share by right of representation), and in case my said brother Frederic, or either of my said sisters, or any of said children of Mary D. Child, deceased, above mentioned die in my lifetime, or before said trust shall terminate, leaving children, such children shall take the parent's share by right of representation."

The children of Mary D. Child at the date of the death of the testator, James Guild, were Mary L. E. Bush, Franklin D. Child, George F. Child, Sophia C. Harbeck and Samuel G. Child, the testator of the plaintiffs in the case at bar. Samuel G. Child died during the lifetime of the life tenant, unmarried and without issue. Franklin D. Child conveyed his interest to George F. Child. George F. Child, Mary L. E. Bush and Sophia C. Harbeck claimed to be entitled to the whole trust estate.

The plaintiffs signed an agreement to transfer the \$7,500 to the defendants if Samuel G. Child did not have a vested inter-



est, and gave a bond to the judge of probate binding themselves to transfer the \$7,500 to themselves as executors if Samuel G. Child had a vested interest.

*C. E. Hellier*, for the plaintiffs.

*A. E. Denison & W. S. Campbell*, for the defendants.

LORING, J. It is plain that if the words "such of" had not been inserted in the twelfth clause of the will, the plaintiffs' testator would have had a remainder vested subject to be divested by his dying leaving issue him surviving at the date of his decease.

It is also plain that a mistake has been made in drafting the will. The sentence and limitation which were begun by the words "such of" stand unfinished and incomplete.

And finally it is plain that the mistake was either in the insertion of these words or in the omission of the description and limitation begun by them.

The surviving children of Mary D. Child, who are the defendants here, ask us to hold that the mistake consists in omitting the rest of the sentence, and to correct the mistake by reading into this article of the will the words "as survive my wife," or their equivalent.

The leading case in this Commonwealth on supplying words in a will is *Metcalf v. Framingham Parish*, 128 Mass. 370, which has been often cited and followed. It is not the province of the court to conjecture what the intention of the testator would have been had the omission been called to his attention. It is the more restricted duty of ascertaining his intention by construing the words which he has used and of supplying the words which the court finds necessary to express that intention fully. It cannot supply words to give effect to an intention which he has not expressed by the words used by him. In construing the particular words in question they are to be construed in the light of the will as a whole; see *Bradlee v. Andrews*, 137 Mass. 50, 53; *Towle v. Delano*, 144 Mass. 95, 99; see also Lord Halsbury in *Inderwick v. Tatchell*, [1903] A. C. 120, 122. Or, as it was well put by V. C. Page Wood in *Hope v. Potter*, 3 Kay & Johns. 206, 209, 210, cited and relied on by the defendants, words can be supplied only where it is plain by necessary implication what the words to be supplied are.

If we pass by the difficulty that it is no more than a conjecture whether the mistake in the case at bar consists in leaving in the words "such of" or in leaving out the dependent clause, and assume in favor of the defendants from the presence in the will of the words "such of" that the mistake consists in the omission of the dependent clause, it is a matter of conjecture what the omitted dependent clause is. It must be gathered from the gift over contained in the following sentence, the sentence with which the article ends, construed in the light of the rest of the will. This sentence makes provision for the brother or any of the sisters, or any of the children of the deceased sister Mary "leaving children," in case they die either during the lifetime of the testator or during the continuance of the trust for the life tenant, and the provision made is that "such children shall take the parent's share by right of representation." Judged by this sentence, the omitted clause was to confine the provision made by it to the class consisting of the brother, the sisters, and the children of the deceased sister Mary who did not die leaving children; but there is nothing to indicate by necessary implication (to use the phrase used by V. C. Page Wood) that the prior gift to the class above named was to such of that class as survived the duration of the trust for the life tenant, and did not include all of the class who survived the testator and who subsequently died leaving no children then surviving at the date of their several deaths. It is at least a matter of conjecture which of these two was the provision contained in the omitted clause, and for that reason no missing words can be supplied.

Indeed if we were at liberty to indulge in conjectures of this kind, it is at least as probable that the omitted clause did include those surviving the testator and dying not leaving children at the date of their several deaths. The gift over is a gift to take effect in case the brother or any sister or any child of the deceased sister Mary should die "in my lifetime, or before said trust shall terminate," and the omitted clause (following the lines of the following sentence containing the gift over) may well have been a clause which together with the words of the will gave the remainder to "such of my brother and sisters and children of my deceased sister as shall have survived me and

shall not die leaving children before the termination of the trust."

The case principally relied on by the defendants is *Donnell v. Newburyport Homœopathic Hospital*, 179 Mass. 187. That is a case where there was a gift over by way of substitution, and the gift over was not commensurate with the previous gift; it was held that the gift over was to be cut down to fit the previous gift.

A decree must be entered declaring that Samuel G. Child had a vested interest in the land described in the bill of complaint, and directing the \$7,500, the proceeds of the sale of the interest of Samuel G. Child, to be transferred to the plaintiffs as executors.

*So ordered.*

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CHARLES GERDING, JR. vs. EAST TENNESSEE LAND  
COMPANY & another.

CLASSEN MOWRY, administrator, vs. SAME.

NATHANIEL W. MYRICK vs. SAME.

BYRON A. BEAL vs. SAME.

Suffolk. December 11, 1903. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Jurisdiction. Equity Jurisdiction.*

A creditor of an insolvent corporation, organized in another State, who voluntarily has become a party to a general creditors' suit against the corporation in the Circuit Court of the United States in a district of the other State, in which a receiver has been appointed, will not be allowed to maintain a suit of equitable attachment under R. L. c. 159, § 3, c1. 7, in this Commonwealth, for the purpose of reaching funds which have been held by this court to be due to the corporation, the title of the receiver being good as a matter of comity.

In a general creditors' suit against an insolvent corporation in another jurisdiction, in which a receiver had been appointed, an order was made that such creditors as should indemnify the receiver for costs and expenses might prosecute certain claims of the corporation, and should be entitled to the proceeds thereof coming into the hands of the receiver to the exclusion of other creditors and persons who did not within thirty days after notice of the order join in providing security for the payment of costs and expenses. A creditor then a party to the suit

did not elect to join in the prosecution of the claims. By a subsequent order the time for electing to share in the prosecution of the claims was extended. Before this extension had expired, the creditor by leave of court withdrew from the general creditors' suit. The creditors who joined in the expenses prosecuted in this Commonwealth the claims covered by the order to a successful issue. Nearly four and a half years after he had elected not to contribute to the prosecution of these claims, and nearly three years after their successful prosecution by those who did contribute, the creditor, who had withdrawn from the general suit, brought a suit of equitable attachment in this Commonwealth, under R. L. c. 169, § 8, cl. 7, to reach the funds decreed to be due the corporation in the Massachusetts suits and prevent their passing to the hands of the receiver. *Held*, that the plaintiff had no standing in equity to maintain such a bill, that having elected not to contribute to the prosecution of the Massachusetts suits he in equity must yield to the prior rights of the creditors who contributed to them and prosecuted them to a successful termination.

LORING, J. On November 18, 1893, a general creditors' bill was filed in the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee against the East Tennessee Land Company, a corporation created by the State of Tennessee, and having its principal place of business in that State. On November 20, 1893, a decree was made in that suit declaring that the land company was insolvent, directing all creditors to come in and prove their claims on or before April 1, 1894, and appointing receivers to take possession of its property and collect all sums due to it. Acting in pursuance of this decree and of subsequent orders recited in the opinion in *Hayward v. Leeson*, 176 Mass. 310, 324, and herein-after stated, suits were begun in the Superior Court of this Commonwealth to recover from one Leeson and one Hopewell secret profits realized by them as promoters of the company. These suits were held by this court in *Hayward v. Leeson* to be well brought. It appeared, however, that there had been no assignment of these claims to the receiver, and for that reason it was held that the suits should have been begun in the name of the company. In pursuance of that opinion, the receiver was allowed to amend by making the company the nominal plaintiff. *East Tennessee Land Co. v. Leeson*, 178 Mass. 206. These suits have been before the court twice since then. *East Tennessee Land Co. v. Leeson*, 183 Mass. 37. *East Tennessee Land Co. v. Leeson*, ante, 4.

The suits now before us are four bills of equitable attachment, brought by persons claiming to be creditors of the East Tennes-

see Land Company for the purpose of having the funds which this court held were due to that company from Leeson and Hope-well applied in payment of the debts due these plaintiffs respectively; three of them were originally filed in October, 1900, and one (that by Beal) in December, 1902. They have been defended by the receiver in the name of the company.

The principal defence set up is that these plaintiffs have voluntarily become parties to the general creditors' suit in the United States Circuit Court in Tennessee, and for that reason cannot maintain these bills of equitable attachment in this State.

The decree of the Circuit Court of the United States sustaining the bill as a general creditors' bill and appointing receivers to take possession of the property of the company, for the purpose of reducing it into money and distributing it *pro rata* among the creditors of the company, has the same effect as an involuntary assignment in insolvency proceedings. It is settled in this country that such a sequestration has no effect, *proprio vigore*, beyond the territorial limits of the State in question, and that it will not be allowed as matter of comity in the courts of another State to prevail against any remedy which the laws of the latter afford to its own citizens against property of the company within its jurisdiction. *Taylor v. Columbian Ins. Co.* 14 Allen, 353. *Wit-  
ters v. Globe Savings Bank*, 171 Mass. 425, 426. We assume for the purposes of this case that citizens of other States not citizens of the State in which the attachment is made are entitled to the same rights against property in this Commonwealth as citizens of the Commonwealth. See in this connection *Blake v. McClung*, 172 U. S. 239, and 176 U. S. 59. See also *Blake v. Williams*, 6 Pick. 286, 308; *Sturtevant v. Armsby Co.* 66 N. H. 557; *Paine v. Lester*, 44 Conn. 196; *Milne v. Moreton*, 6 Binn. 353. Indeed, the courts of New York go so far as to extend this right to citizens of the same State as the insolvent. *Barth v. Backus*, 140 N. Y. 230. Myrick is a citizen of Massachusetts; the other three plaintiffs are citizens of States other than the State of Tennessee, Gerding and Beal being citizens of New York, and Mowry a citizen of the State of Rhode Island.

We are of opinion that where a non-resident creditor voluntarily becomes a party to the insolvency proceedings he thereby elects to take advantage of and become bound by those proceed-

ings, and cannot thereafter resort to remedies against the property of the insolvent in other States to which otherwise he would have had a right to resort. See *Wilson v. Keels*, 54 S. C. 545. This depends upon a principle similar to that on which it is held that a creditor of another State who voluntarily submits to such involuntary proceedings is bound by a discharge granted in the course thereof, as to which see *Cole v. Cunningham*, 138 U. S. 107, 114.

It remains to state in detail the claims of each of the four plaintiffs, and in what way they have become parties, if they have become parties, to the insolvency proceedings in the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

The first bill now before us was brought by one Gerding as assignee of one Meissner. By deed dated February 1, 1893, Meissner conveyed to the East Tennessee Land Company a tract of land for \$28,000. Of this purchase money \$500 was paid down, and three notes were given by the land company for the balance: one for \$7,500, and the other two for \$10,000 each; and these three notes were secured by ten first mortgage bonds of the company for \$1,000 each. The first two notes have been paid. The note in question was dated February 1, 1893, and was due February 1, 1894. Meissner proved his note and the ten bonds, in the insolvency proceedings, and they are allowed in the decree establishing the debts of the East Tennessee Land Company.

Before stating the terms of this decree and how it dealt with the Meissner claim, it will be necessary to state more in detail the proceedings in the Circuit Court of the United States.

On March 23, 1894, (that is to say in the March next after the November in which the creditors' bill was filed,) suit was brought by the Central Trust Company of New York, trustee under a mortgage of the property of the land company, to foreclose the mortgage; and by an order dated the same day the two suits were consolidated. On February 27, 1897, a decree was entered in the consolidated causes, in which, after declaring that the mortgage was duly executed, that bonds secured by it are outstanding and that the lien thereby created is a valid

lien on the property thereby conveyed, it is decreed that the amount of the said mortgage debt which has been proved is \$1,110,686.58, "and that bonds of said issue to the par value of \$54,150 are outstanding in addition to those proven in these causes as enumerated above for which no claims have been filed in these causes, and the names of the holders of which are unknown to the court; and that there is now due and payable to the holders of the said \$54,150 of bonds, the principal of said bonds together with such interest thereon as shall hereafter be proved to be unpaid thereon upon presentation of said bonds for payment out of the proceeds of sale as hereinafter provided." It is then declared that the first bill "has been sustained as a general creditor's bill and the assets of said corporation shall be sold and applied to the payment of its debts, under the several bills in these consolidated causes," and it is decreed (1) by paragraph twenty, that the receivers' indebtedness amounts to \$9,631.10; (2) by paragraph twenty-one, that the indebtedness of the company secured by vendor's liens on land of the company which are prior in point of time to the time of the mortgage, is \$141,794.15; (3) by paragraph twenty-two, that the indebtedness of the company secured by vendor's liens which are subsequent in point of time to the time of the mortgage, amount to \$23,439.66; (4) by paragraph twenty-three, that the indebtedness secured by pledge of personal property amounts to \$202,409.09; and (5) by paragraph twenty-four, that the amount of the unsecured debt of the company is \$224,818.04. As part of each of the paragraphs mentioned is a statement in detail giving the name of the several creditors and the amounts found to be due to them respectively covered by the paragraph in question.

The decree makes provision for the sale of the property of the company, and after doing so, "it is further ordered, adjudged and decreed that the several persons mentioned in paragraphs eleven, twenty-one, twenty-two, and twenty-three of this decree are creditors of the East Tennessee Land Company to the amounts shown to be severally due them by the recitals in said paragraphs, and it is, therefore, adjudged and decreed that they have and recover from the East Tennessee Land Company the amounts severally due to them as aforesaid, and that, as to any

balance due them after the proceeds of any and all properties upon which there are specific liens in their favor have been applied, they shall be general creditors of the East Tennessee Land Company, and as such entitled to their *pro rata* share of its general estate and the proceeds of its property not otherwise appropriated under the terms of this decree; that the several persons mentioned in paragraph twenty-four of this decree are creditors of the East Tennessee Land Company to the amounts shown to be severally due them by the recitals in said paragraph, and it is, therefore, adjudged and decreed that they have and recover of the East Tennessee Land Company the amounts severally due them as aforesaid."

Meissner's ten bonds are included in the \$1,110,686.58 mentioned in paragraph eleven, and his note is included in the \$141,794.15, mentioned in paragraph twenty-one. By paragraph thirty-two of the decree it is provided that "no part of the distributive share herein directed to be paid to Frederick Meissner or Charles H. Younger upon their vendor's lien, or upon the bonds held by them as collateral security, shall be paid to them until the further order of this court."

This proviso was inserted in the decree because it was claimed by the receiver that there is nothing due to Meissner on the ground that, by the written agreement of purchase a proportionate part of the price should be abated in case there was a failure of title in acreage warranted by the deed, and that there was in fact such a failure of title.

Meissner assigned his claim to the plaintiff Gerding after the rendition of this decree.

After the assignment Gerding brought a petition of intervention which is still pending. The lands conveyed by Meissner "are in the possession of John K. Hayward as receiver of the East Tennessee Land Company, pending the determination of the rights of the parties under said petitions of intervention and the answers thereto in said consolidated causes."

It is plain that the owner of the Meissner note or of the bonds given as collateral security for the payment of it has voluntarily become a party to the insolvency proceedings in the Circuit Court of the United States, that Gerding succeeded to his rights and is now pursuing them in those proceedings. Under these



circumstances he cannot maintain a bill of equitable attachment against the property of the company in this Commonwealth. As against this plaintiff the title of the receiver is good as matter of comity.

The second suit was originally brought by one Daniel A. Mowry. He died August 11, 1901, and Classen Mowry, the administrator of his estate, has been admitted to prosecute the bill. Mowry owned eight bonds, which he intrusted to one Schumacher, which were proved by Schumacher and are included in the \$1,110,686.58, covered by paragraph eleven of the decree.

It appears that there is a contest between Mowry and the Harriman Land Company as to whether Mowry's judgment has become its property, and Mowry is a stockholder in the land company. That is immaterial here. It appears further that Mowry also claims that Schumacher, to whom he intrusted his bonds, had no authority to have them reduced to judgment. Whether he had or not, judgment on them has been recovered in the consolidated causes which Mowry has not sought to have avoided although those causes are still pending. The owner of this claim now holds judgment for it in the insolvency proceedings, and cannot maintain this bill to enforce his demand by attachment of property in this Commonwealth.

The third bill is brought by one Nathaniel W. Myrick, claiming by assignment from the executor and executrix of Nathaniel Myrick. Nathaniel was the holder of a note for \$3,120 secured by mortgage bonds of the East Tennessee Land Company of the par value of \$3,100. In addition he held mortgage bonds of the face value of \$11,000. The executor and executrix of Nathaniel Myrick "filed the interest coupons of said bonds which remained unpaid for a time prior to April 1, 1894, amounting to the sum of \$717.85," in the insolvency proceedings in the Circuit Court of the United States, and they are included in the \$1,110,686.58, covered by paragraph eleven of the decree. After the entry of this decree, covering *inter alia* these coupons, the executor and executrix assigned to the plaintiff the note for \$3,120, the bonds and claim for \$717.85, under the decree of February 27, 1897. On the insolvency of the company and the bringing of the general creditor's bill, creditors were put to their election as to the

course to be pursued by them, and among the creditors who had to make their election were the executor and executrix of Nathaniel Myrick. They elected to prove under the insolvency proceedings the interest due on said bonds which remained unpaid for a time prior to April 1, 1894. We are of opinion that they could not separate the debt in making an election, and that by proving on the coupons they made an election as to the bonds, and by proving on the collateral they made an election as to the note for \$3,120 for which \$3,100 of the bonds were held as security. The present plaintiff has succeeded to the rights of the executor and executrix and to nothing more, and is precluded from maintaining this bill by the voluntary action of his assignor in becoming a party to the insolvency proceedings in the Circuit Court of the United States in Tennessee.

The fourth bill is brought by one Beal, who owns five bonds of the face value of \$5,000, being \$5,000 of the \$54,150 of bonds outstanding in the hands of persons unknown covered by the concluding sub-section of paragraph eleven of the decree of February 27, 1897. After the entry of this decree, to wit, on March 26, 1897, Beal filed his intervening petition in the insolvency proceedings. This was allowed and referred to a master, who reported on July 12, 1897, that Beal owned the five bonds and that there was due thereon, on July 1, 1896, the sum of \$5,881.25. Subsequently, to wit, on July 2, 1898, Beal procured an order to be entered allowing him to dismiss his intervening petition and withdraw his bonds.

It appears that on February 5, 1898, the Central Trust Company filed a motion in the consolidated causes "to discharge Receiver Hayward because the services of a receiver in these causes are no longer required, or (b) failing in this that said Central Trust Company be absolved from the costs of the receivership hereafter." This came on to be heard, and on April 11, 1898, in the order entered on this motion it is declared that there are still matters which require the services of a receiver; that from and after the entry of the order in question the costs and expenses of the receivership shall in no event be taxed to the trust company or to its sureties, nor to the funds produced or realized from the mortgage property foreclosed therein; the order then recites that the chief purpose in retain-

ing the receiver is for the enforcement of certain claims the proceeds of which will go to the general creditors, and as to which the trust company is charged with no duty; thereupon "it is ordered that the receiver continue the prosecution of said suits only in the event that creditors of the East Tennessee Land Company who are parties to these causes shall provide securities for the costs of such suits, including the expenses of the receiver and his counsel, for such sums and in such form and amount as the clerk of the court may deem adequate and satisfactory, and to be sufficient to protect the Central Trust Company from being charged or liable for any such expense from the date of the entry of this order. It is further ordered that the creditors so indemnifying the receivers, as aforesaid, and who shall elect to further continue the prosecution of said suits or actions, shall be entitled to the proceeds or benefits thereof to the extent of their respective claims and to the proceeds of all property and assets hereafter coming into the hands of said receiver to the exclusion of other creditors and persons who do not, within thirty days after notice to the solicitors for the respective parties of the entry of this order, join in providing security for the payment of further costs and expenses as hereinbefore required." On May 23, 1898, the Harriman Land Company claiming to be entitled by assignment to claims covered by the decree of February 27, 1897, to the amount of \$1,224,397.80, filed its bond under this order. On June 24, 1898, it having been made to appear to the court that sufficient time had not been allowed to creditors residing at a distance, an order was made extending the time within which bonds could be filed for twenty days, and providing that if creditors filed their bonds within the twenty days they should have the same rights as those complying with the original order. Within the twenty days another creditor filed a bond. The suits in this Commonwealth against Leeson and Hopewell have been prosecuted by the receiver since then under these orders.

By the terms of the original order of April 11, 1898, any creditor who wished to participate in the prosecution of these suits had "thirty days after notice to the solicitors of the parties of the entry of this order" in which to make his election. Beal was then a party to the consolidated causes appearing there by

his solicitors Washburn, Pickle and Turner. Moreover, when Beal withdrew on July 2, 1898, the further time allowed for electing to share or not to share in these suits had not expired. Full opportunity was given to Beal to join in the prosecution of them at a time when the outcome of them had not become assured. When the bills against Leeson and Hopewell were filed in the Superior Court in this Commonwealth does not appear; neither does it appear when they were heard in that court. They first came on for hearing in this court in December, 1899, and the decision reported in 176 Mass. 810, was rendered June 15, 1900. That opinion may be taken to have brought those suits to a successful termination. When Beal filed the bill in equity now before us does not appear. But it was not sworn to until December, 1902, that is to say, nearly three years after the suits against Leeson and Hopewell had become a success.

The plaintiff Beal elected not to contribute to the prosecution of these suits. He allowed other creditors to contribute to the expense of conducting them under an order that they should be conducted for the benefit of the contributors. He lay by for nearly four years and a half after he elected not to contribute to the prosecution of these suits, and for nearly three years after these suits had been brought to a successful issue by the efforts of those who did contribute. He then undertook to step in and appropriate to himself the fruits of the expenditures of those who did contribute. He has no standing in equity to maintain such a bill. He does not stand in the situation he would have stood in had these suits against Leeson and Hopewell been conducted at the expense of the company. They were in fact conducted by creditors and at the expense of creditors. Under these circumstances, Beal, who elected not to contribute to these suits, must in equity yield to the prior rights of the creditors who contributed to them and prosecuted them to a successful termination.

It has been argued at length by the plaintiffs that the creditor's bill in Tennessee was a fraud on the court. In addition, this court has been urged not to "permit the fund to be taken from its jurisdiction without assurance that the interest of creditors non-resident in Tennessee, and especially Massachusetts

citizens, will be fully protected, and it is submitted that upon the facts disclosed upon the record no such assurance can be given, but on the contrary it appears that the administration in Tennessee will deny all of these plaintiffs any share or participation in the fund," and they rely on what was said by this court in *Buswell v. Order of the Iron Hall*, 161 Mass. 224, 234-236, in support of that request.

The question in *Buswell v. Order of the Iron Hall* was whether this court should allow the Massachusetts assets collected by a Massachusetts receiver of an insolvent association which had its origin and principal place of business in Indiana, to be administered in Massachusetts for the benefit of Massachusetts creditors, or whether the court should direct those Massachusetts assets to be transmitted to the receiver in Indiana, to be administered there for the benefit of all creditors, including those who were citizens of Massachusetts. The investigation to be entered upon was an investigation as to the amount of the fund in the Indiana court, and the order of distribution adopted there. Without deciding that such an inquiry as was directed in that case could be made in such suits as those now before us, and that what was said there is applicable here, it is enough to dispose of the contention made here to say that there is nothing in the conduct of the case in the Circuit Court of the United States which raises a question as to these plaintiffs having justice done to them. It appears that the consolidated causes are still pending in the Circuit Court of the United States in Tennessee, and for that reason that court can deal more fully with the rights of all parties. Indeed no other court can deal so fully with the conflicting rights of all interested as that court, which has before it all the parties interested who choose to intervene. As to the contention, that that suit is a fraud on that court and has been used as an instrument of fraud in depriving these plaintiffs of their rights as creditors, it is enough to say that these bills are not, either with respect to the parties defendant or the allegations made, bills on which such a ground of suit can be pursued.

It appears that on February 2, 1903, an order was entered in these suits, appointing a receiver to collect any sums paid by Leeson and Hopewell in the two suits brought against them in

the name of the East Tennessee Land Company, to be held by him until the report in these suits had been heard by this court.

The entry in each of these suits must be

*The plaintiff is not entitled to maintain his bill. Hayward, receiver, as against the plaintiff, is entitled to the fund in the hands of the receiver in this suit. When the fund in the hands of the last named receiver has been disposed of, this bill is to be dismissed with costs.*

J. Templeton, (of Tennessee,) for the plaintiffs.

W. H. Russell, (of New York,) (W. B. Winslow & L. G. Farmer with him,) for the defendants.

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METROPOLITAN COAL COMPANY vs. BOUTELL TRANSPORTATION AND TOWING COMPANY.

Suffolk. January 18, 1904. — April 1, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Contract, What constitutes. Waiver. Words, "From."*

The defendant in a letter to a ship broker dated September 28, offered to furnish a tug and coal barges at the price of \$225 per day, "beginning before November 1st, and continuing until May 1st." The plaintiff, a coal company, in a letter to the ship broker dated September 28, stated that it accepted the offer "from November 1st to May 1st," otherwise reciting it in accordance with its terms. The ship broker wrote to the defendant that its offer had been accepted by the plaintiff "from November 1st or earlier to May 1st." Later the defendant withdrew from the transaction and was sued by the plaintiff for breach of contract. *Held*, that there was no contract; that the letter of the plaintiff materially varied the terms of the defendant's offer and was not an acceptance but a new offer which the defendant never accepted, and the letter of the ship broker to the defendant, if it purported to report an acceptance of the defendant's offer in accordance with its terms, did so without authority from the plaintiff. No question of ratification was raised.

A period "from" a certain day when there is nothing to show the contrary excludes the day named.

To constitute a waiver the act relied upon as such must have been done with knowledge of the thing to be waived.

CONTRACT for breach of an alleged agreement for the charter of a tug and coal barges. Writ dated December 26, 1899.

In the Superior Court the case was tried before *Mason, C. J.*,

185	391
188	518
185	391
190	368
185	391
192	354

without a jury. The correspondence relied on by the plaintiff as constituting the contract sued upon was as follows:

"Boston, Sept. 26, 1899. Messrs. Walter, Friend & Co., Boston, Mass. Dear Sirs, — We will agree to furnish four or five barges that will insure cargoes at a satisfactory rate and carry not less than 8000 tons of coal and a first class tug boat of not less than 1000 H. P. to tow these or other barges, our option of substituting one or more barges for others, without inconvenience to charterers, to carry coal from New York, Philadelphia, Newport News, Norfolk or Baltimore to Boston, beginning before November 1st, and continuing until May 1st, 1900. The price per day for the above tug and barges to be \$225, to be divided proportionally, charterers to load, trim and discharge all cargoes and furnish the tug with Bunker coal at their expense. Tug to be at all times at the service of charterers to do whatever towing they may require, in addition to towing the above barges. Very truly yours, Wm. H. Mack, Manager. Above offer is good until Thursday noon."

"Boston, Mass., September 28, 1899. Messrs. Walter, Friend & Co., No. 129 State Street, Boston, Mass. Dear Sirs, — We herewith accept your offer to furnish us with four (4) or five (5) Barges that will insure cargoes at satisfactory rate, and carry not less than eight thousand (8000) tons of coal; and also a first class tow-boat of not less than one thousand (1000) horse power, to carry coal for us from November 1st, 1899, to May 1st, 1900, from New York, Philadelphia, Newport News, Norfolk and Baltimore to Boston.

"All the above as per conditions and terms named in option to you from W. H. Mack, Manager, dated September 26th, 1899. The above is to be subject to usual conditions of charter. Yours truly, Metropolitan Coal Co., by Edward Hamlin, President."

"Boston, Sept. 28th, 1899. William H. Mack, Manager, Boston, Mass. Dear Sir, — Your offer made to us to furnish four or five barges and a tug to transport not less than 8000 tons of coal from New York to Norfolk, Newport News and Baltimore to Boston from November 1st or earlier to May 1st, has been accepted by the Metropolitan Coal Co. to whom we made the offer in accordance with your offer to us at \$225 per day, they to load, trim and discharge cargoes and furnish and

pay for Bunker coal for the tug. Very truly yours, Walter, Friend & Co."

The telegram referred to near the end of the opinion was as follows: "Oct. 7, To Walter, Friend & Co., State St., Boston. Consider deal off. Will be in my office Monday. Wm. H. Mack." Another telegram on the same day was as follows: "Cleveland, O., Oct. 7/99. Walter Friend Co., Boston. Charter with you was conditioned on my being able to get tug & Barges from here down, which cannot do. Will be in my office on Monday. Wm. H. Mack."

Walter, Friend and Company were ship brokers doing business in Boston. William H. Mack was general manager of the defendant, having an office in Boston.

At the close of the evidence the defendant requested the judge, among other things, to rule: "First. That on all the evidence no contract has been established between the plaintiff and the defendant as declared on, and the plaintiff cannot recover in this action. Second. That the purported acceptance, dated September 28, 1899, in writing, by the Metropolitan Coal Company (Exhibit 2), is not in the same terms as the offer and does not constitute a valid acceptance of the offer. . . . Fourth. That a statement of a party that there is no contract by reason of the offer having been conditional does not, in case the offer was not conditional, preclude the party from defending on the ground that there was no acceptance in the terms of the offer or meeting of minds, and therefore no contractual relation."

The judge refused to make any of these rulings, but upon the fourth request ruled as follows: "The court does not rule that in every case a party by the statement suggested would waive the other defence, but that in this case, on the evidence, the court finds that the trivial variation in language, if amounting to a variation in substance, was waived."

The judge found for the plaintiff in the sum of \$50,000, which was the *ad damnum* of the writ; and the defendant alleged exceptions.

*E. P. Carver & A. C. Burnham*, for the defendant.

*R. M. Morse*, (*C. E. Hellier* with him,) for the plaintiff.

BRALEY, J. If it be assumed that the plaintiff succeeded in establishing the fact that William H. Mack was the general



agent of the defendant and as such had authority to make an agreement by which it would be bound, the more important and decisive question between the parties remains to be decided, and that is whether the evidence was sufficient as a matter of law to prove the contract set out in the declaration.

The contract, if any, was made by an offer and reply in writing, and the only variance is the time referred to in each, when the agreement was to take effect, and the defendant was to become entitled to the daily price to be paid by the charterer.

No uncertainty appears in the language of the offer. The words "beginning before November 1st, and continuing until May 1st, 1900" were used in the proposal dated September 26, 1899, and may be construed as meaning that at any time after September 26 and before November 1 the defendant was ready to make an agreement to charter its tug boat and barges for continuous service, ending May 1 of the following year.

Whatever business plans or projects may have been contemplated by the manager or agent of the defendant it does not become important to consider, as he had a right to fix in his offer the date when the proposed service should commence.

There were no negotiations directly between the parties, but whatever was done took place through a firm of ship brokers to whom the original offer was addressed, and by them it was communicated to the plaintiff.

On September 28, 1899, the plaintiff sent to the brokers an alleged acceptance, in which the conditions contained in the offer were stated, with the exception of the time in which the contract was to be performed. Instead of "beginning before November 1st, 1899" the letter of the plaintiff fixed the period of service "from Nov. 1st, 1899, to May 1st, 1900." This letter was not sent to the defendant, but the brokers were content to inform its agent on the same day by letter that the offer had been accepted, and giving the date of performance as being "from November 1st or earlier to May 1st." The transaction remained in this form and stopped at this point, as there is no evidence of any further steps being taken by them.

While the intent of the parties to the proposed contract should not be defeated by any over-refined or too technical construction of the language used, an acceptance that varies

from the offer, at least in any of its substantial particulars, cannot be deemed an assent to the proposition to which it is sent in reply, but it is to be classed as an independent proposal.

Where a contract is in writing the agreement is to be found from the language used. In a contract formed by a written offer, followed by an acceptance in writing, it is the acceptance which furnishes the required element of agreement, and indeed binds the offerer to perform his undertaking according to its terms, because the offer has now become a contract by the mutual understanding and assent of the parties to what is to be performed.

The contract is made and completed by an offer, followed by a simple unconditional acceptance. *Stoddard v. Ham*, 129 Mass. 383, 385. *Hussey v. Horne-Payne*, 8 Ch. D. 670.

When the defendant offered to charter its vessels for a definite time, clearly stated, it was not an assent to or acceptance of its offer for the plaintiff to name another period, even though the date of termination in the contract proposed and that stated in the reply was the same. *Harlow v. Curtis*, 121 Mass. 320. *Lincoln v. Gay*, 164 Mass. 537, 540. *Horne v. Niver*, 168 Mass. 4. *Eliason v. Henshaw*, 4 Wheat. 225. *Minneapolis & St. Louis Railway v. Columbus Rolling Mill*, 119 U. S. 149. *Hyde v. Wrench*, 3 Beav. 334.

Assuming without deciding that the time named, "from November 1st or earlier to May 1st," may have been the same in legal effect as "beginning before November 1st, and continuing until May 1st, 1900," it is enough to say for the purpose of this case that it was not the proposition submitted to the brokers by the plaintiff, or transmitted by them to the defendant.

The law that an undisclosed principal may avail himself of a contract entered into for his benefit by his agent when acting within the limits of his authority, or may ratify his unauthorized acts, is undisputed, but the plaintiff puts its case on the contract claimed to have been made by the offer, followed by its letter of acceptance, and not on the letter of the brokers, which in fact conveyed a different proposition from that which they were authorized by their principal to transmit. The brokers were not the general agents of the plaintiff, and their authority to act rested on the terms of the letter, which did not become an ac-

ceptance until either it had been sent, or its contents communicated to the defendant by the plaintiff's authority. *Coddington v. Goddard*, 16 Gray, 436, 444, 445. *Morris v. Brightman*, 143 Mass. 149, 151. This was the ground on which recovery was sought, and the trial proceeded on the theory that there was no substantial variance between the offer and the reply. Whether the plaintiff upon ratification of the action of the brokers in its behalf could have maintained an action against the defendant, is a question that was not raised, and is not before us.

On the face of the papers the contracting parties never assented to the same period of time in which the agreement was to be performed, and no contract was established.

When the new term as to time was introduced, the letter of the plaintiff cannot be treated as an acceptance, but must be considered as a new offer or counter proposal, and in order to become a contract would have to be accepted by the defendant. *Gowing v. Knowles*, 118 Mass. 232, 233.

To meet this difficulty, the plaintiff is obliged to resort to a construction that treats this difference as one so immaterial in its nature that it is not within the principle discussed. The right to begin the term of service is put by the defendant at any time before November 1, but the letter of the plaintiff fixes the date as from November 1. If the most favorable construction is given to this interpretation, and the reply is considered as a formal acceptance, the period would begin apparently November 2, as there is nothing to show that it was intended to include the day from which the time of service began to run. *Walker v. John Hancock Ins. Co.* 167 Mass. 188, 189, and cases cited.

Or the same legal proposition may be put in another form. Under the offer, the latest day would have been October 31; by the acceptance, the earliest, November 2, when the time of performance became of binding force and effect. A variation of two days seems to be unavoidable, and their value in money is substantial and measures the pecuniary difference between the offer and the acceptance. Such a difference, if insisted upon, cannot be treated as of a trifling or immaterial character.

It became incumbent upon the plaintiff to go still further, and it evidently contended at the trial that there had been a waiver on the part of the defendant of so much of the offer as

related to the time when the term of service should begin, and the ruling given "that in this case, on the evidence, the court finds that the trivial variation in language, if amounting to a variation in substance, was waived," was wrong.

A waiver must be found, if at all, either in the language or conduct of William H. Mack, the general manager of the defendant.

From the uncontradicted evidence it is plain that he never saw or knew of the contents of the communication of the plaintiff to the brokers, and after their letter to him no further correspondence or interviews took place either with them or the plaintiff.

The telegrams sent by him could not therefore be considered as a waiver of any part of the offer; neither can the fact that certain forms of a proposed charter party were shown to him on September 27, to which he made no objection, but only asked if the president of the plaintiff corporation would sign, aid the plaintiff in this contention, for the reason that the brokers, after obtaining the president's assent, never disclosed that fact to him.

In order to hold that he waived the variation and agreed to the substitution proposed by the acceptor, it must appear that he knew of it. *Fort Payne Coal & Iron Co. v. Webster*, 163 Mass. 134, 137. *Holdsworth v. Tucker*, 143 Mass. 369, 376.

For the doctrine of waiver rests on the ground that the party to be bound knows of the change, and intentionally by express words, or impliedly by his conduct, assents to a modification or abandonment of his legal rights which are to be affected, and thereafter the parties proceed upon the substituted or new agreement thereby created. *Kent v. Warner*, 12 Allen, 561, 563. *Rogers v. Rogers*, 139 Mass. 440, 443.

The result is that the parties are finally left to the documentary evidence alone for a determination of their contractual relations, and as there had been no acceptance the defendant had not become bound by any contract with the plaintiff. It follows that the telegram of October 7, directed to and received by the brokers, operated as a recall of its offer and terminated their agency. *Lincoln v. Gay*, 164 Mass. 537.

The first, second and fourth rulings requested by the defendant should have been given.

*Exceptions sustained.*

## MELISSA ABBOTT &amp; another vs. ALICE M. FROST.

Middlesex. January 25, 1904. — April 1, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Tax, Sale.*

Under our statutes taxes on mortgaged real estate, where neither the mortgagor nor the mortgagee has required a separate assessment, are assessable wholly to the mortgagor in possession.

A sale of mortgaged real estate for non-payment of taxes on the whole property, legally assessed to the mortgagor alone, if the statutory requirements have been complied with, passes to the grantee of the collector an absolute title to the whole estate freed from the mortgage and all other incumbrances, subject only to the right of redemption given by R. L. c. 13, § 58.

Under R. L. c. 13, § 85, the lien for taxes assessed on real estate, where there has been no alienation of the property, continues after the expiration of two years until the tax is paid or the property is sold, and in such a case a purchaser at a tax sale made after the two years gets as good a title as if the sale had taken place within that period.

After notice of a tax sale of mortgaged real estate to take place on a certain day has been given, an entry of the mortgagee for the purpose of foreclosure under R. L. c. 187, § 1, and a subsequent sale under a power of sale in the mortgage, do not operate as an alienation of the property or in any way affect the rights of the purchaser at the tax sale.

BILL IN EQUITY, filed August 12, 1903, by the purchaser at a foreclosure sale under a mortgage of certain real estate in that part of Framingham called South Framingham, and by the mortgagee, to remove a cloud on the title of the first named plaintiff by setting aside a tax sale to the defendant alleged to be invalid.

The following facts among others were disclosed by the record: The tax sale was advertised to take place on August 16, 1902, and on that day was adjourned until August 23, 1902, when the sale took place. The collector's deed to the defendant was dated September 15, 1902. The entry to foreclose the mortgage was made on August 22, 1902. The foreclosure sale at which the plaintiff Melissa Abbott was the purchaser was held on September 16, 1902.

The Superior Court made a decree dismissing the bill with costs; and the plaintiffs appealed.

185	398
189	73
185	398
193	193
194	300

*C. Abbott*, for the plaintiffs.

*W. Adams*, for the defendant.

BRALEY, J. Unless the sale of the premises described in the bill was invalid because the tax assessed had ceased to be a lien at the time of sale, the defendant's title is good and the plaintiff Melissa Abbott has no title to be clouded. For all of the time covered by the several assessments the property was subject to a mortgage duly recorded, but neither the mortgagor nor mortgagee brought into the assessors any statement under St. 1882, c. 175, requiring them to ascertain and fix a value on the interest of each in the real estate, and in the absence of any compliance with this preliminary requirement it could be lawfully assessed to the mortgagor in possession. Such assessments are permitted by our laws relating to taxation, and have been held to be in strict accordance with their provisions. Pub. Sts. c. 11. St. 1889, c. 84. *Worcester v. Boston*, 179 Mass. 41, 49.

Before St. of 1881, c. 304, subsequently Pub. Sts. c. 11, §§ 13-15, when land subject to a mortgage was assessed to the mortgagor in possession the entire estate was assessed, and there was no division or separation of the legal and equitable titles, and the lien for the tax was as broad as the assessment.

No distinction between these titles before possession by the mortgagee under foreclosure proceedings is recognized, and the tax assessed and the sale for its payment covers and includes both estates. *Parker v. Baxter*, 2 Gray, 185.

If the object of this enactment was to prevent double taxation and to require that the interest of each should be respectively ascertained, and in all cases they should be separately assessed or taxed as joint owners, it was subsequently amended so that from being mandatory in terms provision was made that real estate subject to a mortgage could be legally assessed to the owner in possession, unless either the mortgagor or mortgagee had given to the assessors within the time for bringing in lists of taxable property a sworn statement of the amount due under the mortgage. St. 1882, c. 175.

It is agreed that the mortgagor was in possession for the whole period, and it does not appear that either he or the mortgagee made any effort to have the respective interest of each assessed.

Unless either complied with the statutory provision made for their benefit they need not be deemed joint owners, and a tax otherwise lawfully imposed did not become invalid because the mortgagee had not been recognized in the assessment. *Worcester v. Boston, ubi supra. Cummins v. Christie*, 179 Mass. 74.

If a sale follows it is commensurate with the tax lien, for in theory the taxing power assesses with one hand and at the same time demands payment with the other, and if the assessment is valid, a sale for its collection properly made is also valid. *Hill v. Bacon*, 110 Mass. 887.

At the time these taxes were assessed and when the sale took place, St. of 1888, c. 390, § 30, as amended by St. of 1889, c. 334, § 9, provided that . . . "If such tax remains unpaid for fourteen days after demand therefor, it may with all incidental charges and fees be levied by sale of the real estate within said two years, or after the expiration of said two years, if the estate has not been alienated prior to the giving of the notice of such sale."

When a sale of real property under this and similar statutes is made for taxes lawfully assessed, the entire title or interest in the land passes to the grantee by the deed of the collector, and it does not become essential to inquire whether his title is to be considered as the result of all previous titles and which are transmitted to him by operation of law, or a new title conferred under a taking by the sovereign power to enforce a public right to which property under our constitution is generally made subject. See *Harrison v. Dolan*, 172 Mass. 395, 398; *Emery v. Boston Terminal Co.* 178 Mass. 172, 184.

Such a lien constitutes a charge or incumbrance on the land without which it could not be sold, and at any time within the limitation a sale or conveyance would vest in the purchaser an absolute title to the whole estate freed from the mortgage which was in existence, and all outstanding incumbrances. *Hunt v. Boston*, 183 Mass. 303, 305, and cases cited.

The plaintiffs contend that at the time of sale the statutory lien had expired, at least as to a part of the taxes, and as the sale cannot be divided and held good in part and invalid as to the remainder it was not effectual to cut off the mortgage.

They also take the further position that after the express

limitation of two years had run the sale, though effectual to transfer the interest of the mortgagor, left the estate of the mortgagee unaffected, and that it did not pass title to the whole property. *Sherwin v. Boston Five Cents Savings Bank*, 137 Mass. 444.

But if the tax for each year constituted a lien, the last tax having priority over preceding taxes, yet the collector might sell separately, or make a single sale for all the taxes. *Keen v. Sheehan*, 154 Mass. 208. *Pixley v. Pixley*, 164 Mass. 385. *Lancy v. Snow*, 180 Mass. 411. In these cases, however, no question seems to have arisen like that now presented. Here the difficulty arises when an attempt is made to determine whether the lien expires in all cases with the limitation of two years. Notwithstanding the lapse of time the nature and extent of the charge upon the estate does not change, but is co-extensive with the condition of the title at the time of assessment and when it first attaches, and continues to be the same throughout. The whole land is held, and not the mere interest of the individual to whom it is taxed, and the manner of assessment, if legally made, really defines the extent of what must be treated as a lien, to which it is the legislative intention to make all other titles subordinate. *Langley v. Chapin*, 134 Mass. 82, 87. *Hunt v. Boston*, *ubi supra*.

The lien attached at the time the taxes were severally assessed, and for the statutory period of two years the estate could not be divested of this paramount claim by any subsequent incumbrance or change of ownership.

But if the precedent condition of alienation which works a discharge of the lien does not arise, then no change has taken place in the title which operates to free the property made subject to it until the tax is paid or the estate sold. *Kelso v. Boston*, 120 Mass. 297, 299.

Where there has been no change in ownership the estate is still subject to the taxes assessed and remains liable to be sold for their payment, and the purchaser, if all statutory requirements have been followed, gets as good a title as if the sale had been made within the period of two years.

The entry of the mortgagee for the purpose of foreclosure under R. L. c. 187, § 1, and the subsequent sale under the power



in the mortgage were after notice of the tax sale had been given, and did not work a change in the title, as the alienation of the property contemplated by the statute in order to destroy the right of the collector to sell must occur in point of time before notice of such sale is given.

If the mortgage had ceased to be a legitimate incumbrance at the time of entry, or foreclosure by sale, those claiming under it acquired no estate in fee, and the plaintiffs have no title to be clouded.

A sale therefore under the conditions disclosed by the record in this case, whether made before or after the qualified limitation of two years had run as to each of the taxes, must be held to have passed to the purchaser a good title free from all incumbrances, subject only to the right of redemption given by law to the owner or those lawfully claiming under him. R. L. c. 13, § 58.

*Decree affirmed.*

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### COMMONWEALTH vs. JAMES H. HUDSON.

Plymouth. February 25, 1904. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & BRALEY, JJ.

*Evidence, Admissions and Confessions, Remoteness. Arson.*

At a trial for wilfully and maliciously setting fire to a barn by the burning whereof a dwelling house also was burned, the defendant contended that the presiding judge was not warranted by the evidence on the *voir dire* in admitting a certain confession as voluntary. It appeared, that before the confession a deputy sheriff said to the defendant when four other officers were present "If you are not guilty, don't you think you had better tell the truth?" Whereupon an assistant fire marshal, who had been questioning the defendant, told him that he offered him no inducement for anything he had a mind to say about the matter, that whatever he said must be of his own free will, and that he offered him "no hope or favor whatever." *Held*, that the judge was warranted in admitting the confession as voluntary.

At a trial for wilfully and maliciously setting fire to a barn, the owner of the building, called as a witness by the Commonwealth, was asked by the defendant on cross-examination, whether tramps were in the habit of going into the loft of the barn. The presiding judge excluded the question. *Held*, that the exclusion of the question as calling for matters too remote was a proper exercise of the discretion of the presiding judge.

At a trial for wilfully and maliciously setting fire to a barn, by the burning of which a dwelling house also was burned, the owner of the building, called as a witness by the Commonwealth, testified in his direct examination that the buildings destroyed by fire were insured for \$3,500, and that they had cost \$3,850. The defendant offered evidence tending to show that the buildings cost much less than the sum named, for the purpose of showing that a person other than the defendant had a strong motive for setting fire to the buildings, and also for the purpose of impeaching the witness. The presiding judge excluded the evidence. *Held*, that the exclusion of the evidence, as too remote in its bearing either upon the guilt of the defendant or the credibility of the witness, was a proper exercise of the discretion of the presiding judge.

INDICTMENT, found and returned in the Superior Court for the county of Plymouth on October 27, 1902, for wilfully and maliciously, on August 20, 1902, setting fire to a barn of one Charles W. Smith, by the burning whereof the dwelling house of Smith also was burned.

In the Superior Court the case was tried before *Harris, J.* The Commonwealth offered to prove by one John H. Scott, an assistant fire marshal, and one Albert I. Simmons, a deputy sheriff, that the defendant made a confession to them, three other officers being present at the time. The jury being withdrawn, the judge heard the evidence in relation to the conversation leading up to the confession. Scott testified, among other things, as follows:

"Then I said, 'Do you expect me to believe such a story as that? That is about as correct as most of the stories you have told me. Every story that you have told me you have contradicted it. Now, why don't you go on and tell it just exactly as it was? [Pausing]. I want to get it exactly as it is, because here is the important part of it.' [Pause.] I says, 'Why don't you go on and tell me exactly as it is? Don't you think that the truth is better than a lie?' Right here Mr. Simmons says —  
Q. Now, just a moment. Did he make any reply to that?  
A. He did not. Oh! he says, 'I will.' Yes, he says, 'I will.' But he didn't. Mr. Simmons says then: 'The Marshal has the evidence in the case and knows all about it. Why don't you go on and tell him just as it was? Of course it is not my place to advise you. If you are not guilty don't you think that the truth is better, — that you had better tell the truth?' —  
Q. If you are not guilty, don't you think you had better tell the truth? A. 'Yes.' — Q. Those are the words as you recall

them? A. 'If you are not guilty, don't you think you had better tell the truth?' Then I said, 'Gentlemen, I want you to understand, and I want him to distinctly understand that I offer him no inducement whatever for anything he has a mind to say about this matter. Whatever he does say, and whatever he tells, must be of his own free will: I offer him no hope or favor whatever.' — Q. Then he went on and told you something else, did he? A. Then I asked him a question. [Pausing.] — Q. Now, what did you ask him? A. I want to get that exactly, just right there. [Pausing.] I asked him if when he lit that match, he did not touch it to the hay, and he said he did. I asked him if he saw the hay blaze up and he said that he did. I asked him what he did then, and he said he left the barn and went down there, to his house, and got his wheel and rode to Whitcomb's bicycle shop and got his bicycle repaired, and on his way home the fire was discovered. I asked him what his motive was in setting that fire, and he said he did not know. I asked him if Mr. Smith wasn't a friend of his, and he said 'Yes.'"

In charging the jury as to the alleged confession, the judge instructed them in substance as follows: "The question whether or not the confession is obtained by means of the making of threats, or the holding out of inducements by the officer, is one to be passed upon primarily by the court. If the court is satisfied that the confession was obtained by means of such threat or inducement, it is his duty to exclude it, but if he is not satisfied that it was so obtained, or there is contradictory evidence upon that question, he should submit the evidence to the jury and in this case I submit the evidence to you, and if you find that the alleged confession was obtained either by threat or inducement, you should disregard it altogether; if on the other hand, you find that it was not so obtained, then you have a right to consider it as evidence, giving to it such weight as you think it ought to have."

At the trial, Charles A. Smith, the alleged owner of the building, was called by the Commonwealth as a witness. On cross-examination, the defendant's counsel asked him, for the purpose of showing that some person other than the defendant might have been the cause of setting the fire, "Was there any indication that tramps had been in your loft?" The question being

objected to, the judge said to the defendant's counsel, "Do you mean on that day, or do you mean that as a general question, covering all times?" The counsel replied, "Yes, supposing I put it as a general question: If tramps were in the habit of going into his loft?" The judge excluded the question. The defendant then asked the question: "Well, about the time this fire occurred, Mr. Smith, was there any indication that tramps had been in your loft, very near that time?" It appeared that at the time the fire occurred the witness was out of town. The judge excluded the question.

The same witness testified on direct examination that the buildings were insured for \$3,500, and that they cost \$3,850. The defendant offered evidence tending to show that the buildings cost much less than the sum named, with a view of showing that some person other than the defendant had a strong motive for setting the buildings on fire, and for the purpose of impeaching the credibility of the witness. The judge excluded the evidence.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

*C. A. McLellan*, for the defendant.

*Asa P. French*, District Attorney, for the Commonwealth.

HAMMOND, J. 1. "When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admissible; otherwise, it should be excluded. When there is conflicting testimony, the humane practice in this Commonwealth is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession, if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant." Morton, J. in *Commonwealth v. Preece*, 140 Mass. 276, 277, citing cases. That practice was followed in the present case; and the question is whether the evidence on the *voir dire* warranted the judge in coming to the conclusion that the confession was voluntary. While it may be true that when an arresting officer tells his prisoner that he "had better tell the truth," the general rule is that the confession is inadmissible, still, after all, the real question in any case

is whether such or similar language, when taken in connection with the attending circumstances and with other language spoken in the same or some prior interview, shows that the confession was made under the influence of some threat or promise so that it was not voluntary. *Commonwealth v. Nott*, 135 Mass. 269, and cases cited. *Commonwealth v. Kennedy*, 135 Mass. 543. Even if it be assumed that the question "Don't you think you had better tell the truth?" is in substance equivalent to saying in a direct form that "it is better to tell the truth," still the subsequent statement by the officer that he offered the prisoner "no hope or favor whatever" must be considered in connection with it. After a careful perusal of the whole evidence, we think that the presiding judge was warranted in coming to the conclusion that the confession was not procured by threat or promise, but was the free and voluntary act of the defendant.

2. The question whether tramps were in the habit of going into the barn was properly excluded, as also was the evidence as to the cost of the building. Under the circumstances of this case the presiding judge may well have thought that those matters were too remote to be of any practical use to the jury in deciding upon the guilt of the defendant or the credibility of the witness Smith, who was the owner of the building.

*Exceptions overruled.*

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HARVARD BREWING COMPANY *vs.* NATHAN D. PRATT,  
administrator.

Middlesex. March 1, 1904. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

*Practice, Civil, Auditor's report.*

Where the parties to an action agree that an auditor's report therein shall be taken as an agreed statement of facts, and that, if the agreed facts warrant the conclusion reached by the auditor, the judgment shall follow the auditor's finding, the only question open in this court, on an appeal from a judgment following the auditor's finding, is whether the auditor was bound as matter of law to come to a different conclusion on the facts reported. In this case the facts warranted the finding of the auditor.

CONTRACT by a corporation for money alleged to have been misappropriated by the defendant to his own use while treasurer of the plaintiff, with a declaration in set-off as stated in the opinion. Writ dated September 13, 1900.

In the Superior Court the case was heard by *Pierce, J.*, without a jury, upon an auditor's report, under an agreement of the parties which is stated in the first paragraph of the opinion. The judge gave judgment for the plaintiff in the sum of \$11,095.65, following the finding of the auditor; and the defendant appealed.

*N. D. Pratt*, administrator, *pro se*.

*W. S. Knox*, for the plaintiff.

KNOWLTON, C. J. The evidence in this case tends to show that the defendant's intestate, who was the treasurer of the plaintiff corporation, appropriated to his own use at different times various large sums of money which belonged to the plaintiff, and which this action is brought to recover. The question presented for our consideration relates to the first item in the defendant's declaration in set-off, which is as follows: "To services and expenses of defendant's intestate as treasurer and general manager prior to 1895, twenty-three months at \$300.00, \$6,900.00." This item the auditor disallowed, and the parties have agreed that his report shall be taken as an agreed statement of facts, and that if the agreed facts warrant the conclusion reached by the auditor, the judgment shall follow the auditor's finding; otherwise the finding for the plaintiff shall be reduced by the sum of \$4,375.

The facts in relation to this item stated in the auditor's report, are as follows: "In the spring of 1893, before said brewery was built, and before the plaintiff had started in business, said Coffey, who had theretofore been engaged in the meat and provision business, agreed with the plaintiff to put a certain amount of capital into the corporation and work as treasurer and general manager of the same long enough to learn the business before he would ask any salary, provided he should be appointed to the position of treasurer and general manager. Said Coffey was appointed to such position and rendered some services to the plaintiff in the same up to January 1st, 1895, when in consequence of his request, made in December, 1894, to be

informed 'when he would go on salary' he was granted a salary of \$2,500 per annum to begin with January 1, 1895. Such salary was in December, 1897, raised to \$3,600 per annum, and said sums were respectively drawn by said Coffey as his salary while treasurer. I find that said Coffey never made any claim upon the plaintiff for salary or compensation for services rendered as treasurer and general manager previous to January 1st, 1895, until June 16th, 1898, when, trouble having arisen over the brewery affairs between the plaintiff and said Coffey, a letter was received by said Coffey from the plaintiff as follows." Then follows a letter from the plaintiff, by the chairman of its executive committee, to the defendant's intestate, bearing date June 18, 1898, informing him that for reasons well known to him the committee would recommend to the board of directors, at a meeting to be held on June 16, his dismissal from the office of treasurer, and suggesting that if he should conclude to be present at the meeting, or tender his resignation in writing, he would relieve the committee from an unpleasant duty. A reply to this letter was sent, as follows:

"Lowell, June 16, '98.

John Joyce, Pres. Harvard Brewing Co.

Sir,— Before voting on treasurership vote to pay my first year's salary and expenses, also the thirty-five hundred dollars (\$3500.00) which I put in for a cash start, making a total of seven thousand five hundred dollars (\$7500.00), which is only a small part of what I have spent for the brewery.

Salary . . . . .	\$2,500
Expenses . . . . .	1,500
Cash put in for start on books . . .	3,500
	<hr/>
	\$7,500

Respectfully yours,

John H. Coffey."

"No evidence was submitted of any other request to or demand on the plaintiff by said Coffey, that he should be paid for services rendered the plaintiff prior to January 1, 1895."

The burden of proof was on the defendant to establish his claim for the amount of this item. The agreement of the parties presents the question whether the auditor was bound, as

matter of law, to find affirmatively that the plaintiff was indebted for these services. *Ingalls v. Hobbs*, 156 Mass. 348. *Dyer v. Swift*, 154 Mass. 159. We think it very plain that he was not. All there is to sustain the defendant's contention is, that in the spring of 1893 the defendant's intestate was appointed treasurer, under an agreement that he should work long enough to learn the business before he would ask for any salary, and that "he rendered some services to the plaintiff," prior to his request, made in December, 1894, "to be informed 'when he would go on salary.'" The arrangement under which he was serving up to that time, the fixing of a salary of \$2,500 per annum to begin January 1, 1895, in response to this request, his taking his salary at that rate and at a subsequently increased rate without ever asking for anything for services prior to January 1, 1895, until after he was informed that he was likely to be removed from his office, and other facts which appear in the report, well warranted the finding of the auditor that this item was not established as a valid claim against the plaintiff.

*Judgment affirmed.*

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ALFRED A. MARCUS & another *vs.* MARY A. CLARK  
& others.

Suffolk. March 1, 1904. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

*Contract, Performance and breach, Implied. Waiver. Evidence. Assignment.*

In an action for an alleged breach of a contract in writing to convey certain land to the plaintiff, it appeared, that the contract called for a conveyance free from incumbrances, and that the defendant before making the contract had imposed certain restrictions on his land, but it also appeared, that the plaintiff knew of these restrictions when the contract was made and was satisfied to take a conveyance subject to them and expected to do so, and did not raise the objection of the restrictions until the time for performance had expired without the plaintiff having the purchase money ready. *Held*, that it could be found that the plaintiff had waived any objection to the title based on the restrictions, and that to recover he must prove that the defendant wrongfully had refused to convey the land subject to the restrictions.



In an action for an alleged breach of a contract in writing to convey certain land to the plaintiff, the defendant introduced evidence that the day after the time for the performance of the contract had expired the assignee of the plaintiff, for whose benefit the action was brought, stated to the defendant's attorney that "he had difficulty in getting the money" and asked for an extension of time. The plaintiff offered to show in rebuttal that the assignee's real purpose in asking for the extension was that he wished to ascertain whether he could handle the property with certain restrictions on it which he recently had found to exist. *Held*, that the evidence offered in rebuttal was inadmissible, a secret purpose of the plaintiff's assignee undisclosed to the defendant's attorney when he made the statement to him being immaterial.

In an action for an alleged breach of a contract in writing to convey certain land to the plaintiff, brought for the benefit of the plaintiff's assignee, the defendant can show that, when the defendant had no knowledge of the assignment, the nominal plaintiff requested an extension of the time of performance of the contract on the ground that he had not the purchase money ready, this being admissible against the assignee who had not notified the defendant of the assignment. So much the more is this so, where the assignor requesting the extension had an interest in the contract when the request was made.

In an action to recover damages for an alleged breach of a contract in writing to convey certain land to the plaintiff, if the plaintiff fails to prove a readiness to perform on his part, he cannot recover in that action a part payment he has made under the contract.

CONTRACT for alleged breach of an agreement in writing to convey to the plaintiffs certain land in that part of Boston called West Roxbury. Writ dated November 4, 1902.

In the Superior Court the case was tried before *Mason*, C. J., without a jury. The judge found for the defendants; and the plaintiffs alleged exceptions, raising the questions stated by the court.

The sixth ruling requested by the plaintiffs, which is mentioned in the opinion and held to have been refused rightly, was as follows: "If the court finds that the plaintiff was not bound under the agreement of August 28, 1902, to take a deed of said land subject to the restrictions contained in the agreement between the defendants and the city of Boston, and that the plaintiff was ready to perform his agreement if there had been no restrictions, then he could maintain this action against the defendants without making any further tender, or offer to perform on his part."

*F. T. Hammond*, (*W. B. Orcutt* with him,) for the plaintiffs.

*J. J. Higgins*, for the defendants.

LORING, J. This is an action on a written contract for the purchase and sale of land, to recover damages suffered by the

purchaser from the sellers' failure to fulfil their part of the agreement. The contract called for a conveyance by the defendants free from incumbrances upon payment of \$25,000 within sixty days from the date thereof. Five thousand dollars of the purchase money was paid by the assignment of a note immediately after the contract was signed. The contract was dated August 28, 1902, and was assigned by the plaintiffs to one Jennings on the day it was executed. The plaintiffs proved that on July 18, 1902, (a little more than a month before the contract here sued on was executed,) the defendants had entered into a covenant with the city of Boston by which they imposed restrictions on the land in question.

The judge who heard the case without a jury found as a fact that the plaintiffs had full knowledge of the restrictions when the contract was made, but that the fact "that the plaintiffs and their assignee, Jennings, had full knowledge of the restrictions at the time of the making of the agreement, and upon which the action is based, is not material to the construction of said agreement." The sixty days expired on October 27, 1902.

The plaintiffs have argued that inasmuch as the defendants by their prior covenant of July 18 had put it out of their power to perform the obligation which they assumed in their contract of August 28, it was not necessary for the plaintiffs to aver and prove that they were ready and willing to perform the agreement. But the judge has found as a fact that during the time when the plaintiffs were entitled to a conveyance on paying the balance of the purchase money, the plaintiffs were satisfied to take a conveyance subject to these restrictions as a full performance of the defendants' obligation to make a conveyance under the contract, and never expected to receive anything else; and that the objection by reason of the restrictions was an afterthought which was first put forward after the time for performance had expired. This is a finding that the objection based on these restrictions was waived, and that both parties to the contract were proceeding on the footing that it had been waived. The existence of the restrictions under this finding did not put the defendants in the wrong, and the plaintiffs, to maintain this action, had to prove that the defendants had wrongfully refused

to convey subject to the restrictions. The sixth ruling requested was rightly refused.

The next exception argued by the plaintiffs is one to the exclusion of evidence. The defendants introduced evidence tending to show that on the day after the time limited in the agreement had expired, Jennings came to the defendants' attorney and stated that "he had difficulty in getting the money," and asked for an extension of time. The plaintiffs offered to show in rebuttal by Jennings that the real purpose for which he asked for an extension was that he "desired further time to see if he could handle this property with the restrictions on, which he had recently found to exist," which purpose was not disclosed to the defendants or their attorney. It is immaterial what undisclosed and secret purpose Jennings may have had so long as he stated to the defendants' attorney that his reason for an extension was difficulty in raising money and this was the only reason stated by him. This evidence was rightly excluded.

The next exception argued by the plaintiffs is to the ruling of the judge admitting evidence of "talks between the witness and the plaintiffs after the assignment was executed." It appeared from the writ that this action was brought in the names of Alfred A. and Simeon Marcus "for the use and benefit" of Jennings the assignee. The talks admitted were between one Schon, who as a real estate broker originally brought the land to the attention of the assignors, the nominal plaintiffs, and who was sent by them to one Page who acted as broker for the defendants in the sale covered by the contract sued on. Schon was allowed to testify that "about the end of September or the beginning of October," Marcus asked him to get Mr. Page to give an extension because "I [Marcus] haven't got the money"; that witness saw Page and the offer was refused; that thereupon Marcus instructed the witness to offer Mr. Page \$1,000 for an extension of time, to be forfeited as liquidated damages if the purchaser failed to perform his agreement; that this was refused, and that subsequently Marcus said to him: "I guess I will drop it; Mr. Page won't give an extension, and they cannot give any title and there are restrictions"; that witness replied, "I told you that there were park restrictions all the time, especially before you went down to see Mr. Page"; and

that "this conversation took place probably the middle of October." If the plaintiffs' assignee did not notify the defendants of the assignment, he was bound by the action of his assignors who were the original parties to the contract and the only parties known to the defendants. Any request for an extension made by the original parties to the contract under such circumstances is admissible against the assignee. The presiding judge may have admitted the evidence on this ground.

In addition to this Jennings had previously testified that "he knew that the Marcuses were having difficulty in raising the \$20,000 required to complete the contract; that is why he went to Mr. Wyman [the defendants' attorney] to get an extension," and it appeared later from Jennings's testimony in rebuttal that the plaintiffs were to raise the balance of the purchase money for him and were to have all realized from a subsequent sale of the land over the purchase money paid and \$8,000 owed to Jennings by the plaintiffs. It further appeared that Jennings left the whole matter of raising the money to the plaintiffs; that Jennings did not take any action in the matter until the last day within which the purchase money could be paid, and that all he did on that day was to make an appointment to meet the defendants' attorney on the next day.

This request for an extension made by a person interested in the contract when the request was made is admissible although the action is now brought for the exclusive use and benefit of the other party to the agreement. The plaintiffs were not injured by the admission of this evidence.

The plaintiffs have further argued that on the facts stated the defendants are not entitled to retain the note which was assigned to them as part payment of the purchase money, and that in any event the plaintiffs are entitled to recover the value of it on the principle of *Burk v. Schreiber*, 183 Mass. 35. But the case at bar is not a case like *Burk v. Schreiber*, where an action was brought to recover back a part payment on rescission of the contract under which it was made. No such claim was made in the court below. The pleadings go on the basis of affirming the contract and claiming damages on the ground that it was broken. The rulings asked for by the plaintiffs went on that basis.

*Exceptions overruled.*

## JOHN H. EMERSON vs. TRUSTEES OF MILTON ACADEMY.

Norfolk.    March 2, 1904. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, &amp; BRALEY, JJ.

*Tax, Exemption.*

Under R. L. c. 12, § 5, cl. 3, the exemption of the real estate of a literary institution from taxation does not exempt real estate used to produce income to be expended for the purposes of the institution, but does exempt real estate used for one of the purposes for which the corporation was established, and if this is the dominant purpose it is immaterial that there may be incidental results of the use which would not entitle the property to exemption. The dominant purpose of the managing officers of the corporation, so long as they act in good faith and not unreasonably in determining how to use its real estate, will be given effect by the courts.

Under R. L. c. 12, § 5, cl. 3, real estate of the trustees of Milton Academy used for dwelling houses of teachers of the academy with their families as an aid in preserving discipline and in bringing about closer relations with the pupils, the use being allowed as part of the compensation of the teachers, properly can be found to be occupied for the purposes for which the institution was incorporated, and therefore to be exempt from taxation; so can land used for a baseball field and a football field with spaces for spectators, and so can unimproved swampy and thinly wooded land used for recreation by the pupils of the academy.

KNOWLTON, C. J. This is an action to recover taxes assessed upon the real estate of the defendant corporation in the years 1901 and 1902. The case is submitted upon an agreed statement of facts, with an agreement that the court may draw any proper inferences from the facts stated. From a judgment of the Superior Court for the defendant the plaintiff appealed to this court. The only question is whether the judge was warranted in finding for the defendant upon the competent facts stated.

The judge found that Milton Academy\* is a literary institution within the meaning of R. L. c. 12, § 5, cl. 3, and that all the property described in the agreed statement consists of real estate owned and occupied by the academy or its officers for the purposes for which the academy was incorporated. The land in question consists of three lots, the Hunt lot, the Ware lot, and the Vose lot, together containing about thirty-three acres. Besides these the defendant owns the original academy lot, of small

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\* Incorporated March 3, 1798, 2 Special Laws, 227.

area, which is agreed to be exempt from taxation, and another lot not connected with it, which is agreed to be taxable. The plaintiff contends as matter of law that the agreed facts do not warrant a finding that the three first mentioned lots are occupied for the purposes for which the defendant was incorporated.

The law applicable to cases of this kind was considered at some length in *Mount Hermon Boys' School v. Gill*, 145 Mass. 139, and more fully in the recent case of *Phillips Academy v. Andover*, 175 Mass. 118. It has also been applied under varying conditions in many other cases. *Massachusetts General Hospital v. Somerville*, 101 Mass. 819. *Williams College v. Williamstown*, 167 Mass. 505. *Amherst College v. Amherst*, 178 Mass. 232. *Harvard College v. Cambridge*, 175 Mass. 145. The same principle runs through all these decisions. It is that the purposes mentioned in the statute refer to the direct and immediate result of the occupation of the property, and not to the consequential benefit to be derived from the use of it. An occupation and use of real estate to produce income to be expended for the purposes for which the institution was incorporated is not within the statute, while an occupation whose dominant purpose is directly to accomplish some one of the objects for which the corporation was established is within it. If incidentally there are results of the use which would not entitle the property to exemption, that is immaterial, so long as the dominant purpose of the occupation is within the statute. The dominant purpose of the managing officers of the corporation, in the use of the property which they direct or permit, is often, although not always, controlling. So long as they act in good faith and not unreasonably in determining how to occupy and use the real estate of the corporation, their determination cannot be interfered with by the courts. There may be honest differences of opinion among persons of good judgment, as to whether it is wise to use real estate in a particular way for its direct effect in promoting the purposes for which an educational corporation was established. In such cases the managing officers have the responsibility and duty of deciding. A decision plainly unreasonable, which affects the rights of third parties, might be disregarded by the court in a case of this kind, but a decision within the limits of reasonable determination should be given effect.

Upon two of these lots there were dwelling houses with their appurtenances, occupied by teachers in the academy with their families, under an arrangement with each teacher that he should be paid a stated sum per annum, and in addition should have the use of the dwelling house. It is agreed that the defendant deems it important to have several masters living on the academy premises as an aid in preserving discipline, and in bringing about closer relations with the pupils, and that the arrangements with these teachers were made with this end in view. The corporation has adopted this use of these houses as a settled policy. The three lots in question adjoin the original academy lot and one another, and the boundary fences formerly standing between them have been removed. On the Vose lot a baseball field has been prepared, about two and one half acres in area, with additional space for spectators and less frequent plays when the ball is batted to a long distance, making the whole area about four acres. On the Ware lot there is a football field which, with additional space required for players and for spectators, occupies about two acres. The Vose lot, containing about fourteen acres, was received by gift from Mrs. Sarah Forbes Hughes, and by unanimous vote of the trustees was accepted on the following terms in part, namely: "Said land shall not be built upon, but shall be kept open for a playground for all pupils of said Milton Academy; except that at any time the said trustees may in their discretion select about one and one fourth (1 1-4) acres of said land near the southerly boundary thereof, for the purpose of building a suitable house and other buildings thereon for the use of the head master of Milton Academy; except that at any time the said trustees may in their discretion select about one half (1-2) an acre of said land near the northerly boundary thereof, and may place or build and maintain thereon, a building or buildings belonging to said academy; except that at any time the said trustees may in their discretion select a site near the easterly or southerly boundary thereof, and place or build and maintain thereon, a gymnasium or other athletic building; and except that said trustees may, if they deem it advisable, convey to the town of Milton, for such consideration as they deem best, such strip or strips of land as may be necessary to widen the adjoining streets to the limit of one hundred (100) feet or less, but no more.

"If at any future time said Milton Academy shall cease to be a non-sectarian school or shall be removed to other premises than those now occupied by it, all of said land shall be conveyed by the said Milton Academy to the town of Milton for a public playground ; but nothing in this shall be so construed as to give to the town of Milton any rights of any kind whatsoever in regard to said land, until such forfeiture or abandonment shall have taken place."

Of the Ware lot, comprising about sixteen and one third acres, from one third to one half is low and swampy. This part could be used and improved for buildings or for any purpose requiring a firm dry field, only at large expense. Of the remainder a part is thinly wooded in places with small trees, growing near together, and in other places with large trees, detached or in small groves, and a part is pasture, with a poor growth of grass and small shrubs.

"The defendant deems it important for the health and enjoyment of the pupils of the academy and essential for the maintenance of the academy and the successful accomplishment of its purposes, that the grounds of the academy should furnish ample opportunity for recreation in the open air, and that the pupils should have at least all the open space now furnished by the academy grounds for exercise and recreation ; and the academy desires to keep at least the whole area of these fields for such use. The defendant also deems it important for the interests of the academy maintained by it and the successful accomplishment of its purposes, that the school buildings and grounds should be protected against the close proximity of other buildings, and against the possible use of land near the academy for purposes detrimental to the academy. In the judgment of the defendant's officers, all of the land then and now owned by it, as shown on the plan, was and is required for these purposes. The pupils do in fact constantly use the unimproved parts of the fields above referred to as recreation grounds, walking and roaming over them, playing games that do not require grounds to be improved or laid out, and going into the swampy part for amusement, and in the winter for some rough skating. It has always been the purpose of the defendant, since their acquisition, that such use should be made of the fields."



We have no doubt, upon the facts agreed, that the officers of the defendant corporation, in good faith, are occupying and intending to occupy this real estate in a way which they deem directly promotive of the purposes for which the defendant was incorporated. In view of the location of this academy, the number of its students and the kind of educational work which it was intended to do, we cannot say that the occupation of these three lots in the manner described, with a view to the direct effect, in a broad way, upon the education of the scholars, is so unreasonable as to be forbidden to the trustees under the law. The amount of land so held and used is considerable, and if the corporation was limited by strict necessity, less would be sufficient; but it properly may avail itself of opportunities to provide liberally for the physical training, and the social, moral and æsthetic advancement of the pupils who are intrusted to its charge. The judge of the Superior Court was authorized by the parties to draw proper inferences of fact, and we are of opinion that he was well warranted in finding that the property was occupied for the purposes for which the defendant was incorporated, within the meaning of the statute relative to exemption from taxation.

The incidental uses, which have been made of the barn and shed and stables\* connected with the dwelling houses, do not deprive the property of its exemption from taxation. These uses are like those which were held permissible, in connection with other uses for educational purposes, in *Wesleyan Academy v. Wilbraham*, 99 Mass. 599, and in *Mount Hermon Boys' School v. Gill*, 145 Mass. 139.

*Judgment affirmed.*

*F. Rackemannn & R. W. Dunbar*, for the plaintiff.

*W. H. Dunbar*, for the defendant.

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\* The barn was used by permission of the defendant to store hay cut on the Ware lot and Vose lot, under an arrangement by which the defendant sold the standing grass for small amounts with permission so to store it when cut. The stable and shed were on the Hunt lot. The dwelling house was used for a teacher of the academy, but he did not use the stable and shed, and, with his acquiescence, the defendant used them for keeping a lawn roller and various implements for the care of the academy grounds and a horse used to draw the lawn roller and to carry persons and baggage to and from the railroad station and elsewhere in connection with the academy without charge.

## BERTHA TABBUT vs. AMERICAN INSURANCE COMPANY.

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Suffolk. March 7, 1904. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, &amp; BRALEY, JJ.

*Insurance, Fire.*

A contract for insurance against fire, in the form prescribed by our statute, is a contract of indemnity, and the insured is only entitled to be put in the same condition peculiarly in which he would have been had there been no fire.

Under a policy against fire in the Massachusetts standard form, one who has paid certain instalments on a conditional contract for the purchase of a chattel, the title to which is not to pass until all payments have been made, if the chattel is destroyed by fire, cannot recover the value of the chattel at the time of the loss, but, in the absence of proof of other damage, can recover only the amount of the instalments he has paid, that being the measure of his insurable interest.

KNOWLTON, C. J. The plaintiff, having in her possession a piano which she held under a contract of conditional sale, obtained insurance on it in the sum of \$300 by a policy in the Massachusetts standard form in the defendant company. The piano having been destroyed by fire, she brings this action to recover under the policy.

The contract under which she held the piano acknowledged her receipt of it "by way of conditional sale," and contained an agreement to pay \$5 at that time, and \$4.50 on the first day of each month thereafter, until the sum of \$215, which was stated to be its value, should be paid in all, together with interest on all balances at the rate of six per cent per annum. She agreed that the instrument was to remain the property of the person from whom she received it until all of the payments should be made, and that it should not be removed from the house without his written consent, and that, on her failure to perform the agreement according to its terms, he might take immediate possession of it and hold it free from all claims and demands. He signed an agreement that she might retain possession of it if she made the stipulated payments, and that he would give her a bill of sale of the instrument on her fulfilment of the agreement. At the time of the fire she had made four payments amounting to \$20.

Although the title was not in her, it is conceded by the defendant that she had an insurable interest, and that the policy, which was in the common form, covered her interest whatever it might be. *Williams v. Roger Williams Ins. Co.* 107 Mass. 377, 379. *Fowle v. Springfield Ins. Co.* 122 Mass. 191, 194. *Wainer v. Milford Ins. Co.* 153 Mass. 335, 340. *Doyle v. American Ins. Co.* 181 Mass. 139. But her interest was not that of ownership of the instrument, and destruction of the piano by fire would not deprive her of the general property in it. It has often been held in such cases that the risk of loss by destruction without the fault of either party is upon the person who retains the title. After the property had been burned, the plaintiff was not bound by her agreement to pay. *Thompson v. Gould*, 20 Pick. 134. *Weed v. Boston & Salem Ice Co.* 12 Allen, 377, 380. *Wells v. Calnan*, 107 Mass. 514. *Swallow v. Emery*, 111 Mass. 355. *Sloan v. McCarty*, 134 Mass. 245. From the nature of the agreement it is manifest that the parties contemplated, as a condition of performance by each, the continued existence of that to which the contract related. *Butterfield v. Byron*, 153 Mass. 517.

The question in dispute is what sum the plaintiff is entitled to recover as damages. It is agreed that, if she is entitled to recover the full value of the piano, judgment is to be entered for \$215 and interest and costs. If her right to recover is limited to the amount she had paid at the time of the loss, with interest thereon, judgment is to be entered for \$20, and interest and costs. The case was presented on facts agreed, with a statement that the plaintiff had no insurable interest in the property, "except as shown by, or as may be inferred from, the facts" agreed. The plaintiff appealed from a judgment in her favor for the smaller sum.

It is unnecessary to determine whether the interest of the plaintiff had any value in particulars not stated, as the burden was upon her to prove her damages. She had a possessory right, founded on a conditional sale, with the privileges pertaining to it which are given by the R. L. c. 198, §§ 11-13. She had made payments amounting to \$20, of which she was entitled to the benefit under her contract. No facts are stated which warrant the recovery of more than \$20 and interest, unless she was entitled to the full value of the property.

A contract for insurance against fire, in the form prescribed by our statute, is a contract of indemnity, and the assured is only entitled to be put in the same condition pecuniarily that he would have been in if there had been no fire. His damages are not to be diminished because he has collateral contracts or relations with third persons which relieve him wholly or in part from the loss against which the insurance company agreed to indemnify him. *King v. State Ins. Co.* 7 Cush. 1. *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123. *Haley v. Manufacturers' Ins. Co.* 120 Mass. 292, 297. This principle, as applied to mortgages in some of the cases cited, has now become unimportant in this Commonwealth by reason of the provisions in the standard policy, requiring a mortgagee to assign his mortgage to the insurance company if requested. R. L. c. 118, § 60. As a general proposition it is applied broadly, but it has no effect to enlarge an insurable interest, the value of which fixes a limit to the amount to be paid under a policy in common form. In *Washington Mills Emery Manuf. Co. v. Weymouth & Braintree Ins. Co.* 135 Mass. 503, 507, it was said that "The insurer cannot complain if he pays no more than the value of the property he has insured, no more than the sum insured upon it, and no more than the interest of the insured at the time of the loss." But this was said in reference to the effect of collateral contracts and conditions, and not in reference to an enlargement of the interest of the assured, for the protection of which the insurance was obtained. It has application in the present case, in the fact that the defendant cannot diminish its liability in this suit for the interest owned by the plaintiff at the time of the fire, on account of any right which the plaintiff now has under her contract with the vendor.

The plaintiff, in taking her insurance upon the property, became entitled to indemnity only to the extent of her interest. *Doyle v. American Ins. Co.* 181 Mass. 139. Her interest was that of a holder of an executory contract to purchase the property at a given price, of which she had paid a part. That interest was lost by the fire, and for that loss she is entitled to be paid. We are of opinion that the ruling was right.

*Judgment affirmed.*

*D. C. Linscott, (F. K. Linscott with him,) for the plaintiff.*

*J. D. Bryant, for the defendant.*

IDA B. CONVERSE vs. UNITED SHOE MACHINERY COMPANY  
& others.

Suffolk. March 7, 1904. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, &amp; BRALEY, JJ.

*Corporation, Remedy of stockholder. Conspiracy.*

A stockholder in a corporation cannot maintain an action at law for an injury done to the corporation by conspiracy or otherwise. His remedy is through an action by the corporation, or, if unable to induce action of the corporation or its officers for the benefit of the stockholders, then by a suit in equity.

KNOWLTON, C. J. This is an action at law brought against the defendant corporation and three other defendants sued personally, for conspiring to injure and ruin another corporation, the Goddu Sons Metal Fastening Company, in which the plaintiff is a stockholder.

The averments of the declaration are, in substance, that the three personal defendants "conceived the plan of acquiring, by purchase or otherwise, the control of said Goddu Sons Metal Fastening Company and of absorbing its rights, patents and other property into the said United Shoe Machinery Company, of which they were officers and directors," and that afterwards, combining and conspiring with the defendant corporation to injure the property of the other corporation, they acquired a majority of the stock of this other corporation and elected themselves directors and officers thereof, and as such officers and directors were guilty of various misfeasances in the control and management of the corporation, greatly to the injury and damage thereof and of the plaintiff's share and interest therein.

Each of the defendants demurred to the declaration, and the case is before us on the plaintiff's appeal from a judgment for the defendant, founded on an order sustaining the demurrer. Numerous grounds of demurrer are stated, several of which we need not consider.

The defendants contend that the declaration is vague and indefinite, and that it does not set forth with sufficient certainty the cause of action relied on. We will not stop to consider this

part of the demurrer, for if it is overruled, there are other particulars in which the case stated fails to show a ground of recovery. All the wrongs done or intended, set out in the declaration, are wrongs against the corporation in which the plaintiff is a stockholder, and except through the corporation, they have no relation to the plaintiff. She was not affected by the defendants' conduct, except as every other stockholder was affected. Against her as an individual there was no conspiracy, and against her as an individual, no wrong was done directly. There is no direct legal privity between her individually or as a stockholder and these defendants. She has an interest in the corporation, and in the conduct of its officers affecting its property, but this interest in the transactions of the officers is not legal but equitable, and it cannot be made the foundation of an action at law against the officers.

That an action at law cannot be maintained in a case of this kind was clearly shown by Chief Justice Shaw in *Smith v. Hurd*, 12 Met. 371. The plaintiff must find her remedy for such a wrong through a suit by the corporation or through a bill in equity, if she is unable to induce action of the corporation or its officers for the benefit of stockholders. *Peabody v. Flint*, 6 Allen, 52. *Brewer v. Boston Theatre*, 104 Mass. 378. *Dunphy v. Traveller Newspaper Association*, 146 Mass. 495. *Richardson v. Clinton Wall Trunk Manuf. Co.* 181 Mass. 580. *Allen v. Curtis*, 26 Conn. 456. *Conway v. Halsey*, 15 Vroom, 462. *Ritchie v. McMullen*, 79 Fed. Rep. 522.

The averment of conspiracy adds nothing in legal effect to the other averments of the declaration. *Parker v. Huntington*, 2 Gray, 124, 127. *May v. Wood*, 172 Mass. 11.

*Judgment affirmed.*

*H. W. Ogden*, for the plaintiff.

*C. A. Hight*, for the defendant.

## NATIONAL BANK OF THE REPUBLIC vs. LIZZIE DELANO.

Suffolk. March 7, 1904. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, &amp; BRALEY, JJ.

*Husband and Wife. Bills and Notes.*

The signature of a married woman on the back of a promissory note payable to her husband is absolutely void, whether written before or after delivery and whether she signed as a joint maker or as an indorser or guarantor.

KNOWLTON, C. J. The exceptions in this case relate to five of the sixteen promissory notes on which the suit was brought. These notes, bearing date November 18, 1897, were signed by C. R. Delano, were payable to the order of George S. Delano, and on the back of each appeared the following indorsements: "Mrs. Lizzie Delano. Pay only to order of the National Bank of the Republic, Boston, Mass. Geo. S. Delano." The payee and the defendant were husband and wife and the maker of the notes was their son. The notes were given by the son to the father in payment for a three eighths interest in his business, in connection with the formation of a partnership between them.\* According to the testimony of the defendant, she signed them before they were signed by her son. According to the testimony of her husband, she brought them to him with his son's signature upon them, and gave them to him while he was eating his dinner, and he put them into his pocket and kept them until the meal was over, when he asked her to sign them and she immediately affixed her signature.

The exception is to the direction of a verdict for the defendant, on the ground that she was a joint maker of these notes running to her husband, and that her contract was void. If she signed before the notes were delivered and took effect as binding contracts, she was a joint maker under the law of Massachusetts in force when the notes were made. *Union Bank v. Willis*, 8 Met. 504. *Bryant v. Eastman*, 7 Cush. 111. *Pearson v. Stoddard*, 9 Gray, 199. *Richardson v. Boynton*, 12 Allen, 138. See

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\* Some of the facts in this case appeared in *National Bank of the Republic v. Delano*, 177 Mass. 362.

R. L. c. 73, § 81. The St. 1874, c. 404 (Pub. Sts. c. 77, § 15), which required demand and notice to hold parties signing in that way, still left their promise that of joint makers. *State Trust Co. v. Owen Paper Co.* 162 Mass. 156, 160. *Mulcare v. Welch*, 160 Mass. 58. *Legg v. Vinal*, 165 Mass. 555. *Brooks v. Stackpole*, 168 Mass. 537. A promissory note made by a husband to his wife or by a wife to her husband is absolutely void, and the same rule applies to a contract of indorsement and to any other contract purporting to create a liability upon a note. *Fowle v. Torrey*, 135 Mass. 87, 93. *Roby v. Phelon*, 118 Mass. 541. *Browning v. Carson*, 163 Mass. 255. *National Granite Co. v. Whicher*, 173 Mass. 517.

These principles are sufficient to sustain the ruling and dispose of the case, unless the evidence of the husband that he had the notes in his possession a short time before the defendant signed them makes a difference. If her signing was in pursuance of a previous agreement, she would be a joint maker, even though the notes had taken effect before she signed. *Hawkes v. Phillips*, 7 Gray, 284. *Moies v. Bird*, 11 Mass. 436. If she signed after the notes had taken effect, her contract, whether of guaranty or of whatever kind that purported to create a legal obligation, was still a contract with her husband, made upon notes held by him as owner, and it was void, as it would have been if she had signed as a maker or indorser. *Chapman v. Kellogg*, 102 Mass. 246. *Abbott v. Winchester*, 105 Mass. 115. In every possible aspect of the evidence, the contract of the defendant which appears upon the note was a contract with her husband, and was therefore void.

*Exceptions overruled.*

*C. H. Sprague*, for the plaintiff.

*J. B. Crawford*, for the defendant.



CORNELIUS P. SULLIVAN, petitioner.

Suffolk. March 9, 10, 1904. — April 1, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Attorney. Practice, Civil, Order denying petition.*

On a petition of a former attorney at law, for reinstatement as an attorney after disbarment, the Superior Court made the order "Petition of S. for reinstatement as attorney at law denied without prejudice to his filing another petition of like tenor after July 1, 1906." *Held*, that the last part of the order relating to the filing of another petition was for the benefit of the petitioner, and was not intended to preclude the petitioner from a hearing on the merits of another petition filed before July 1, 1906, founded on facts not included in the petition denied, and therefore that the order was valid.

KNOWLTON, C. J. The petition recites that the petitioner was duly admitted to practice as an attorney and counsellor at law in the courts of this Commonwealth, and that he was subsequently disbarred by a decree of the Superior Court. He asks that the decree may be vacated, or so far modified as to permit his reinstatement and readmission as an attorney. The order of the Superior Court is as follows: "Petition of Cornelius P. Sullivan for reinstatement as attorney at law denied without prejudice to his filing another petition of like tenor after July 1, 1906." The record shows no finding of fact nor any statement of evidence. The only question of law before us is whether, as the petitioner contends, that part of the order which relates to the filing of another petition is illegal.

This petition purports to be founded largely on matters involved in the proceedings at the time of his disbarment, and more than anything else is a petition for a review of those proceedings. If the order stopped with the word "denied", and if a petition founded on the same averments should be hereafter filed, the court might treat the matter as *res judicata*, and hold that the judgment on this petition was a bar. It was doubtless for the benefit of the petitioner and to relieve him from this effect of the order on a petition filed after July 1, 1906, that the provision as to another petition was added. We do not understand the provision as intended to preclude the petitioner from

a hearing on the merits, upon a petition filed before July 1, 1906, founded on facts not included in the present petition. Doubtless the court could not make an order which would have that effect. We construe this part of the order as wholly favorable to the petitioner, and as free from legal objection.

*Order affirmed.*

*C. P. Sullivan, (J. M. Sullivan with him,) for the petitioner.*

*A. D. Hill, for the Bar Association of the City of Boston.*



GEORGE W. D. EMERSON, executor, vs. CHARLES E. WARK.

Middlesex. December 9, 1903. — April 2, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Witness. Will.*

Under our statutes a party calling an adverse witness does not hold him out as worthy of credit.

It is error to instruct a jury, that a contestant of a will, calling as a witness the person offering the will for probate as executor and charged with procuring its execution by undue influence, puts him forward as a person who is entitled to be believed as a witness.

LATHROP, J. This is a petition for the admission to probate of an instrument purporting to be the last will of Harriet D. Emerson, which named the petitioner as executor. At the trial before a single justice of this court, sitting with a jury, the case was tried on three issues. The first related to the soundness of mind of the testatrix, the second to whether the signature to the will was that of the testatrix, and the third was as follows: "Was Harriet D. Emerson unduly influenced in the execution of said instrument by the said George W. D. Emerson?" The jury answered these questions in favor of the petitioner; and the contestant alleged exceptions.

During the trial the contestant called the petitioner as a witness, and examined him. The only exception relied upon before us was to the charge of the judge in regard to this witness, which was as follows: "There is one rule of law that I ought to bring

to your attention and that is this, when a party in litigation in court puts a person upon the stand as a witness, they put him forward as a person who is entitled to credit, to be believed as a witness. In this case the contestant put George Emerson upon the stand as a witness. In doing that they put him before you as a person who is entitled to be believed. It does not follow from that that they cannot dispute facts that he testifies to. If a party in litigation puts a person on the stand and he testifies to something, the person that puts him on is at liberty to prove that what he says is not true, but in putting him on they put him before you as a person entitled to be believed. And that, it is proper that you should consider in this case in connection with what George Emerson testified to."

We are of opinion that this ruling was wrong, and was prejudicial to the contestant. It is incongruous to claim that a party who calls an adverse witness, or the other party to the cause, and who is entitled to cross-examine him because he is adverse, thereby holds him out as entitled to credit, when the only object in calling him is to obtain such evidence as may be elicited favorable to the party calling him. In the case at bar the adverse party was the person charged with using undue influence. It cannot be said that by calling Emerson the contestant held him out as a person entitled to credit or to be believed. This would be equivalent to saying that a witness whom the party calling him may impeach in a particular manner is nevertheless held out as entitled to credit.

To ascertain the meaning of the St. of 1869, c. 425, § 1, now R. L. c. 175, § 24, it is necessary to consider the law as it existed at the time the statute was passed. It was held in the case of *Adams v. Wheeler*, 97 Mass. 67, argued in 1867, that while a party could introduce evidence of any competent and material fact, though that fact had been denied by one of his own witnesses, and although the evidence might have the effect of discrediting that witness, he could not introduce evidence for the mere purpose of impeaching the credit of a witness whom he had himself produced. To meet this rule of law the St. of 1869 was passed, which, while it provides that a party producing a witness cannot impeach his credit by evidence of bad character, allows him to contradict him by other evidence, and also allows

him to prove that the witness had "made at other times statements inconsistent with his present testimony."

The St. of 1870, c. 393, § 4, now R. L. c. 175, § 22, provides as follows: "A party to a cause, who shall call the adverse party as a witness, shall be allowed the same liberty in the examination of such witness, as is now allowed upon cross-examination."

In *Ryerson v. Abington*, 102 Mass. 526, 530, it is said by Mr. Justice Gray, in commenting on the St. of 1869: "This statute abrogates the rule of the common law, by which a party who had called a witness was deemed to have held him out as worthy of credit, and was therefore not allowed to prove by other witnesses statements previously made by him, inconsistent with his present testimony, which would not be admissible as independent evidence, and which could have no effect but to impair his credit with the jury." So, too, in *Brooks v. Weeks*, 121 Mass. 433, 435, it is said by Mr. Justice Endicott: "The object of the statute is simply to allow the party to impeach the credibility of his witness by showing, in the manner pointed out, that he has made statements inconsistent with his testimony."

The instruction given in the case before us tended to mislead and confuse the jury, and to impose a burden upon the contestant, which may well have affected the result.

Indeed, at common law, the rule prohibiting the impeachment of a witness by the party calling him has not been always strictly applied in the case of an adverse or a hostile witness. It is said in 1 Stark. Ev. 248: "In the case of an adverse witness, it may frequently happen that what he states in favor of the party who calls him may be regarded as truth unwillingly wrung from a reluctant witness, whilst his counter statements are open to great suspicion; in all such cases, former declarations by the witness are obviously of importance, with a view to ascertain what part of his statement ought to be discredited, whilst credit is given to the rest. The ordinary rules, as to the examination of an adverse witness, supply an analogy in favor of the affirmative of the present question, in all cases at least where the witness is apparently an adverse one." See also *Becker v. Koch*, 104 N. Y. 394; *Webber v. Jackson*, 79 Mich. 175.

In *Garny v. Katz*, 89 Wis. 280, the defendant asked the judge presiding at the trial to instruct the jury that the plaintiff, hav-

ing called the defendant as a witness in his own behalf, held him out as worthy of credit. This request was refused, and on appeal it was held that the action of the judge was right.

We are therefore of opinion that the order must be

*Exceptions sustained.*

*H. P. Harriman & J. F. Neal*, for the contestant.

*G. L. Mayberry*, for the executor.



JOHN C. WILSON *vs.* JOHN D. MULLONEY, assignee.

Suffolk. December 10, 1903. — April 2, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Evidence, Extrinsic affecting writings. Equity Jurisdiction.*

The rule that oral evidence is not admissible to vary the terms of a contract in writing applies only to parties to the contract.

A supply company lent to a company manufacturing time stamping machines a certain sum of money for which the manufacturing company gave its note, and the plaintiff, president of the manufacturing company, assigned to the supply company as collateral security a mortgage made by the manufacturing company to him personally. The supply company agreed in writing with the manufacturing company to reassign the mortgage to the plaintiff and cancel the manufacturing company's note on receiving stamping machines at a certain discount price to the full amount of the note within three months from its date. The supply company made an additional oral contract with the plaintiff that, when it had received from the manufacturing company goods which amounted to the face value of the note, it would reassign the mortgage to the plaintiff. In a suit in equity to enforce this oral agreement, it was *held*, that the plaintiff was entitled to a reassignment of the mortgage on showing that goods were furnished to the supply company nearly to the amount of the note and that the balance due on the note was tendered although more than three months after the date of the note, a strict performance of the conditions not being required in equity if they were performed in substance.

LATHROP, J. This is a bill in equity, filed in the Superior Court, against the assignee of the Smith and Gardiner Supply Company, to restrain the foreclosure of a mortgage given to the plaintiff by the Automatic Time Stamp and Register Company, and assigned by him as collateral security to the Smith and Gardiner Supply Company. The plaintiff also sought by the bill to redeem the mortgage so assigned, and on payment of the amount due to have the mortgage reassigned to him.

The case was sent to a master, and it appears from his report that in March, 1896, the Automatic Time Stamp and Register Company, hereinafter called the Stamp Company, a manufacturer of certain patented devices for stamping letters and other papers, contemplated a business connection with the Smith and Gardiner Supply Company, hereinafter called the Supply Company, by which the latter was to become the selling agent of the former's goods within the United States for the period of three years.

On March 21, 1896, the plaintiff, who was the president of the stamp company, met the president of the supply company, and the two presidents made the following contract :

“ Boston, Mass., March 21, 189 .

The Automatic Time Stamp and Register Co., Boston, Mass.

Gentlemen : We have this day loaned you fifteen hundred dollars (\$1500) and have taken your note for three (3) months for that amount, together with an assignment of a mortgage made by your company to John C. Wilson as collateral security for the said loan.

We agree to take time stamping, or printing apparatuses at the discount price set forth in a contract entered into by and between your company and the Smith & Gardiner Supply Company, to the amount of fifteen hundred dollars (\$1500) within three (3) months from this date, in the manner above set forth, and upon the full amount of said note being paid without interest as aforesaid, we agree to reassign said mortgage to the said John C. Wilson and to cancel the said note.

[Corporate  
Seal]

Smith & Gardiner Supply Co.,  
by John F. McNamee, Treas.”

The note in question was as follows :

“ Boston, March 21st, 1896.

\$1500.00.

For Value received, we promise to pay to Smith & Gardiner Supply Co., or order, the sum of Fifteen hundred Dollars no/100 in Three months from this date.

The Automatic Time Stamp & Register Co.

Per Lowell M. Palmer, Treas.”

On the margin of the note was written : “ Secured by assignment as collateral, mortgage of personal property in Boston.”

The treasurer of the stamp company delivered the note to the treasurer of the supply company, and received from him in return the company's check for \$1,500. On this check the stamp company received \$1,500 in cash. On the same day the letter above set forth was written.

The supply company afterwards gave orders for goods to the stamp company which were filled, and further performance of the agreement was abandoned by both parties.

On April 18, 1899, the stamp company, by its treasurer, in the presence of the plaintiff, tendered the defendant, as assignee of the supply company, \$94.58 in cash, being the balance between the amount of goods furnished, as charged by the stamp company to the supply company, and the amount of the note, and demanded a return of the note. The plaintiff also demanded a reassignment to himself of the mortgage. The master found that the tender was insufficient because it was not made until after the note became due, and no tender was made of interest between the time the note became due and the date of the tender.

The plaintiff offered evidence to show that it was understood and agreed between him and the supply company that goods furnished by the stamp company to the supply company should be received and accepted as payments on account of the note until the same was fully paid. This evidence the master refused to admit, and ruled that there was no ambiguity in the letter of March 21, or in the note, and that evidence tending to show an understanding or agreement prior to or contemporaneous with the making of these instruments was not admissible. The master thereupon found for the defendant.

On the filing of the report in the Superior Court, it was re-committed to the master to hear the parties further upon the question whether any contract was made between the plaintiff and the supply company as to the application of credits of the stamp company to the release of the plaintiff's mortgage, and if such contract was made, what were its terms.

The master heard the parties and reported that three witnesses testified that the understanding between the parties was, that when the supply company should have received goods which amounted to the face of the note, the supply company was to

reassign to the plaintiff personally the mortgage, which had been assigned by him to the supply company as collateral security for the \$1,500. The master reported the evidence on this subject, and it supports a finding in the plaintiff's favor.

When the case came before the Superior Court again, a decree was ordered, on January 12, 1903, "that the mortgage assigned by said plaintiff to the Smith & Gardiner Supply Company be reassigned to the plaintiff upon his paying over to the defendant the sum of \$89.58, with interest thereon to date of this decree, amounting in all to \$154.69, and that the plaintiff recover costs to be taxed by the clerk." The case is before us on the defendant's appeal from this decree, taken on January 14, 1903.

We are of opinion that the decree must be affirmed. There is no technical objection to the evidence introduced by the plaintiff to show that the contract alleged to have been made by the defendant was made. The plaintiff was not a party to the contract and was not bound by its terms. The rule that parol evidence is not admissible to vary the terms of a written contract, does not apply to third persons who are not parties to the contract. *Badger v. Jones*, 12 Pick. 371. *Kellogg v. Thompson*, 142 Mass. 76. *Spooner v. Cummings*, 151 Mass. 313. *McMaster v. Ins. Co. of North America*, 55 N. Y. 222. *New Berlin v. Norwich*, 10 Johns. 229. *Johnson v. Blackman*, 11 Conn. 342, 351. *Edgerly v. Emerson*, 23 N. H. 555, 565.

But, apart from this consideration, the agreement contained in the letter of March 21, was made for the benefit of the plaintiff. He was the owner of the mortgage assigned to the defendant, and was interested to have that mortgage reassigned to him as soon as the \$1,500 was paid, in the manner stated in the letter. If the defendant chose to make an additional oral contract with him to reassign the mortgage to him upon the performance of the conditions contained in the letter, there is no reason why it should not be held to the performance of the agreement.

It cannot seriously be contended that, on a bill in equity to redeem a mortgage, the fact that the conditions agreed upon have not been strictly performed is any defence.

*Decree affirmed.*

*J. P. Barlow & J. D. Mulloney*, for the defendant.

*J. A. Harris*, for the plaintiff.



185 434  
193 52

GEORGE R. HILLIER & another *vs.* MURTAGH FARRELL  
& another.

Middlesex. December 16, 1903. — April 2, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Equity Pleading and Practice*, Master's report. *Rules of Court*.

Chancery Rules 31 and 32 of the Supreme Judicial Court are in force in equity causes in the Superior Court, and exceptions to a master's report must be taken in the manner there directed.

This court cannot revise the findings of a master unless exceptions have been taken to his report.

LATHROP, J. This is a bill in equity filed in the Superior Court to have the defendants restrained by injunction from proceeding with the erection of a building within eighteen feet of Belmont Street, contrary to certain restrictions contained in a deed. The case was referred to a master, who found that this lot and others were sold pursuant to a general scheme or plan. It appears from the master's report that the case was heard on agreed facts and oral evidence, and that the defendants objected to the admission of certain portions of the oral evidence.

On the filing of the master's report, no objections or exceptions were taken. The judge of the Superior Court who heard the case reserved it for our consideration upon the pleadings, the master's report, and the agreed statement of facts.

No regard appears to have been paid to Chancery Rules 31 and 32 of this court, which by force of law apply to the Superior Court as well as to this court. Rule 31 requires the master to prepare a draft report and to notify the counsel, who may suggest such alterations thereof as they may think proper. The master then settles the draft report and again notifies the counsel. If either party is not satisfied, he is allowed five days for bringing in written objections, and these are to be appended to the report. No exception is to be allowed to the master's report, without a special order of the court, unless founded upon an objection made before the master and shown by his report. The thirty-second rule relates to the filing of the exceptions and setting them down

for argument, and further provides: "In every case, the exceptions shall briefly and clearly specify the matter excepted to, and the cause thereof; and the exceptions shall not be valid as to any matter not so specified."

If the master filed his report without giving the defendants an opportunity to file objections to it, their remedy was to move to recommit it. *Lamson v. Drake*, 105 Mass. 564.

The defendants have argued questions of evidence before us founded upon objections taken when the evidence was admitted; but as they filed no written objections or exceptions to the master's report, these questions are not open to them under the rules above referred to. Exceptions to a master's report are to be confined to objections disallowed or overruled by the master. *Copeland v. Crane*, 9 Pick. 73. If no exception is taken this court cannot revise the finding of a master. *Popple v. Day*, 123 Mass. 520. *Roosa v. Davis*, 175 Mass. 117. See also *Gray v. Chase*, 184 Mass. 444, 448.

We are also of opinion that, for the reasons given above, we are not called upon to revise the report of the master in other respects. If parties desire to have a master's report revised, they should comply with the rules of the court.

The only dispute between the parties was whether the restrictions imposed in the deed to the defendants were for the benefit of their grantor, or were imposed in pursuance of a general scheme upon this lot and other lots owned by the plaintiffs. On the findings of the master, the plaintiffs were entitled to an injunction.

*So ordered.*

*H. R. Skinner, (L. T. Macurdy with him,) for the plaintiffs.*

*J. E. Abbott, for the defendants.*

185	486
e187	814
185	436
189	191
189	192
189	268

**JOHN F. CRONAN, administrator, vs. ISAAC M. ADAMS  
& others.**

Suffolk. December 16, 17, 1903. — April 2, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Devise and Legacy, Construction.*

Where by the residuary clause of a will a fund is given to a trustee more than sufficient to pay certain annuities provided for, with a provision that the surplus income shall be added to the principal during the lives of the annuitants, and that on the death of all the annuitants the entire fund including the accumulations shall be distributed, this tends to show an intention that the remainders shall be contingent and vest only upon the death of the last annuitant.

A testator gave the residue of his estate to the Carney Hospital in trust, to pay certain annuities, which the estate was more than sufficient to pay, and then provided as follows: "The remainder of the income of said estate I direct to be added to the principal of the estate during the lives of said annuitants, and on the death of all, I direct the Carney Hospital to take to its own use one quarter of all the estate, and to convey the residue to the youngest Adams of the issue of Durward Adams whose descent is wholly in the male line from said Durward, in default I direct the trustee to convey said residue to the youngest of the issue of Julius Adams Ulman, in default I direct the trustee to convey said residue to the youngest of the issue of Durward Adams, in default I direct the trustee to convey said residue to the youngest of the issue of Elizabeth A. Ulman, in default I direct the Carney Hospital to take to its own use the said residue." Held, that the remainder was contingent on the circumstances existing at the death of the last annuitant, and did not vest in the person who answered the description of the beneficiary at the time of the death of the testator.

BILL IN EQUITY, filed March 5, 1903, by the administrator with the will annexed of the estate of Julius Adams, late of Boston, subject to an agreement of compromise confirmed by a decree made by a justice of this court, for instructions.

A modification of the original agreement of compromise was as follows: "The sum of ten thousand five hundred dollars [increased by a further modification printed below to \$35,500] shall be held by the administrators and invested until the Supreme Judicial Court shall decide whether Isaac Murray Adams, who when Julius Adams died was and now is the youngest Adams of the issue of Durward Adams whose descent is wholly in the male line, took a vested interest in the estate of

Julius Adams or not. If the decision shall be that he took a vested interest, the said sum with its accumulations less expenses as hereinafter provided shall be paid to him or his legal representatives. If the decision shall be that he did not take a vested interest the sum with its accumulations less expenses, as aforesaid, shall be paid to the Massachusetts Hospital Life Insurance Company to accumulate until the death of the last annuitant under the will of said Julius Adams, and then said sum and its accumulations shall be paid over to the administrators or administrator of the estate of Julius Adams in trust to pay the same to the person who under the said will is then entitled to receive the residue of the said Adams estate in that event other than the Carney Hospital, and if there be no such person then to the heirs of the last person who would have taken such residue had he or she survived the last of the said annuitants."

The further modification above referred to, which became a part of the agreement of compromise, was as follows: "The Carney Hospital, a party to said petition and agreement, hereby contributes, from the sum of \$81,250 agreed to be paid to it under said original agreement of compromise, the sum of \$25,000 and to take in full for its share and interest of whatsoever nature in said estate of Julius Adams the sum of \$56,250, said sum of \$25,000 so contributed by said Carney Hospital to be in addition to the sum of \$10,500 already provided in the modification so affixed to said original agreement of compromise to be set apart for the unascertained remainder man entitled thereto upon the death of the last annuitant named in said will, and if there be no such person, then to the heirs of the last survivor who would have taken had he or she survived the last of said annuitants. And said sum of \$25,000 so contributed, together with the said sum of \$10,500 shall be deposited with the Massachusetts Hospital Insurance Company to accumulate for the benefit of the person entitled thereto as in said first modification provided, and to be paid to the person who in accordance with the terms of said first modification shall be entitled thereto."

The case came on to be heard before *Morton, J.*, who, by agreement of the parties, reserved it upon the bill, answers and agreed facts, for determination by the full court, such decree to be entered as should seem meet.

*C. H. Donahue, (J. F. Cronan with him,) for the plaintiff.*

*H. P. Harriman, guardian ad litem for Isaac Murray Adams.*

*G. R. Swasey, guardian ad litem for Marjorie Adams and others.*

*H. W. Hardy, guardian ad litem for contingent interests.*

LATHROP, J. The will of Julius Adams, executed December 23, 1898, and admitted to probate on May 24, 1900, after certain pecuniary and specific legacies, gave the remainder of his estate to the Carney Hospital in trust, to pay from the income of the estate to each of the children of Durward Adams, five hundred dollars a year during the life of each child, and to the child of Alice, deceased daughter of said Durward, five hundred dollars a year during its life. Then follow several other annuities \* to be paid from the income, and this clause follows: "The remainder of the income of said estate I direct to be added to the principal of the estate during the lives of said annuitants, and on the death of all, I direct the Carney Hospital to take to its own use one quarter of all the estate, and to convey the residue to the youngest Adams of the issue of Durward Adams whose descent is wholly in the male line from said Durward, in default I direct the trustee to convey said residue to the youngest of the issue of Julius Adams Ulman, in default I direct the trustee to convey said residue to the youngest of the issue of Durward Adams, in default I direct the trustee to convey said residue to the youngest of the issue of Elizabeth A. Ulman, in default I direct the Carney Hospital to take to its own use the said residue."

The only question presented is whether Isaac Murray Adams, who, when Julius Adams died, was and now is the youngest Adams of the issue of Durward Adams whose descent is wholly in the male line, takes a vested interest in the residue, or whether the person who answers the description is to be determined when the last annuitant dies, and so the interest is contingent. We are of opinion that the latter construction is the true one.

In the first place, what is to be distributed consists not only of the residue but of the accumulated income, and this could not vest at the testator's death. This tends to show that "the

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\* The provisions of this will are described in the report of *Elder v. Adams*, 180 Mass. 303, 304.

vesting of the whole was postponed till the arrival of the event on which the distribution is made to depend." *Hale v. Hobson*, 167 Mass. 897, per Morton, J.

In the next place we are of opinion that the scheme of the will shows that a contingent interest was intended. If Isaac Murray Adams took a vested interest, there was no need of the elaborate scheme of the testator, by which on the death of the last annuitant the residue was to be disposed of. Isaac Murray Adams was living both when the will was made and at the death of the testator, but in the residuary clause he is not mentioned by name. The intention of the testator evidently was that some one person in the four classes he mentions should take, according to the circumstances existing at the death of the last annuitant, and so the person cannot be determined until that time arrives.

*Decree accordingly.*

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HORACE H. STEVENS, executor, *vs.* EDWARD S. BRADFORD  
& another.

Plymouth. January 4, 1904. — April 2, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Tax, On collateral inheritances. Words, "Has been."*

St. 1902, c. 473, postponing the payment of the collateral inheritance tax on future estates until the persons entitled come into possession of them, is retrospective as well as prospective, and applies to all cases where there has been before its passage, as well as where there shall be thereafter, a devise, descent or bequest liable to the collateral inheritance tax.

LATHROP, J. This is a petition to the Probate Court by the executor and trustee under the will of Charles E. Stevens, to obtain the instructions of that court upon the following facts alleged in the petition and admitted by the answer. Charles E. Stevens, by his will, which was admitted to probate on November 2, 1899, bequeathed and devised certain property to the petitioner, in trust to pay the net income to Frederick T. Stevens during his life, and upon his decease to divide and pay over the remainder to the nephews and nieces of the testator,

living at the decease of Frederick T. Stevens. The question presented is whether the collateral inheritance tax of this Commonwealth is now payable by the executor upon the property to be held in trust until the death of Frederick T. Stevens, or whether the payment of the tax is postponed by the St. of 1902, c. 473, until the person or persons entitled thereto come into possession of their property. The Probate Court made a decree that the tax was not now payable, but was postponed by the St. of 1902, c. 473, until the person or persons entitled thereto should come into possession of their property, and added the words: "In other words, that statute is prospective and not retroactive in relation to said tax." From this decree the state treasurer appealed; and the case was reserved by a single justice of this court for our determination.

The question presented depends upon the construction to be given to the St. of 1902, c. 473. This statute, which took effect upon its passage, June 12, 1902, reads as follows: "In all cases where there has been or shall be a devise, descent or bequest to collateral relatives or strangers to the blood, liable to collateral inheritance tax, to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or a term of years, the tax on such property shall not be payable nor interest begin to run thereon until the person or persons entitled thereto shall come into actual possession of such property, and the tax thereon shall be assessed upon the value of the property at the time when the right of possession accrues to the person entitled thereto as aforesaid, and such person or persons shall pay the tax upon coming into possession of such property. The executor or administrator of the decedent's estate may settle his account in the probate court without being liable for said tax: provided, that such person or persons may pay the tax at any time prior to their coming into possession, and in such cases the tax shall be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estates for years; and provided, further, that the tax on real estate shall remain a lien on the real estate on which the same is chargeable until it is paid."

The decree of the judge of the Probate Court is inconsistent, and we are of opinion that he was right in the first part of his

decree and wrong in the words added, and that the latter words should be stricken out. The statute is clearly retrospective and not merely prospective. It applies to "all cases where there has been or shall be a devise," etc. To construe it as relating merely to devises, descents or bequests, subsequently to the passage of the act, would give no effect to the words "has been." The use of the words expresses a clear and unequivocal intent on the part of the Legislature that the statute should operate retrospectively as to all estates where the tax has not been paid. In *Commonwealth v. McCaughey*, 9 Gray, 296, it is said by Mr. Justice Metcalf: "For it is an anciently established rule in the interpretation of statutes, that such a sense is to be made upon the whole statute, that no clause, sentence or word shall prove superfluous, void or insignificant, if, by any other construction they may all be made useful and pertinent. 1 Show. 108. Bac. Ab. Statute, I. 2." See also *Opinion of the Justices*, 22 Pick. 571, 573.

The statute in question was very likely passed to relieve a hardship which was imposed by the preceding laws, by which in case of a legacy in trust to pay the income to A. during his life, with remainder to B., the tax was taken out of the capital, and A. received the income of only the amount of the legacy diminished by the tax, although a legacy to him would not be taxable. In *Minot v. Winthrop*, 162 Mass. 113, 125, where this was held, it was said by Chief Justice Field: "Perhaps a simpler way than that prescribed by the statute would have been to levy the tax at the end of the life estate upon the whole of the fund to be paid to the legatee in remainder." This suggestion of the Chief Justice has been followed in the statute before us.

The decree of the Probate Court amended as we have already stated is to be

*Affirmed.*

*S. D. Elmore*, for the petitioner and the life tenant.

*F. B. Greenhalge*, Assistant Attorney General, for the treasurer of the Commonwealth.



## GEORGE C. KENNEDY vs. MERRIMACK PAVING COMPANY.

Middlesex. January 19, 1904. — April 2, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Negligence, Employer's liability.*

An experienced machinist cannot recover from his employer for an injury caused by his clothing catching on a set screw of a revolving shaft mounted on a flat car while he was attempting to step over the shaft on his way to carry out an order of a superintendent, especially if there was a safe way by which he could have gone to do work he had been ordered to do.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff while in the employ of the defendant. The declaration contained three counts. At the trial in the Superior Court the plaintiff elected to proceed upon the second and third counts. The second count was at common law for being set to work in an unsafe place. The third count was under the St. of 1887, c. 270, § 1, cl. 1, and alleged a defect in the condition of the ways, works or machinery. At the close of the evidence for the plaintiff, the judge directed a verdict for the defendant, and the case is before us on the plaintiff's exceptions to this ruling.

The plaintiff was a man thirty-nine years old. He was a machinist by trade, and had been an engineer for ten years before the injury, and was duly licensed as such under the laws of the Commonwealth. At the time of the accident, June 20, 1902, the plaintiff had been employed by the defendant nine days as an engineer. The defendant was a manufacturer of asphalt. Its plant was divided into three parts. The first was where the asphalt was put into large kettles, underneath which fires were lighted and the asphalt liquefied. The other two parts were placed upon an ordinary flat car, about forty-five feet long and seven feet wide, located upon a spur track of a railroad. The boiler, air tank and engine were at one end of the car, and at the other end were two steam jackets and a machine containing sand drums. These drums were about three feet in diameter and twenty feet in length. Between the engine

and the steam jackets there was a rectangular space three and a half or four feet wide, six feet measuring across the width of the car, six feet in height, and partly open at the top. In this space was the main shaft, two and a half inches in diameter. It was about ten feet long, and extended across and beyond the sides of the car. It rested upon bearings attached to the floor of the car, and was about two and a half feet from the floor. On each end of the shaft on the outside of the bearings was a collar fixed and adjusted with set screws, and outside of these collars on each end of the shaft was a pulley about four feet in diameter, the one on the side of the car where the plaintiff was injured having a twelve inch face. On the main shaft and just inside the bearing at this side of the car was the hub of an old wheel or pulley, about four inches in length, measuring along the shaft, and of a diameter about four inches including the diameter of the shaft. There were five broken spokes sticking out of this hub from three quarters of an inch to an inch and a quarter. The hub was attached to the shaft by a set screw extending out from the outward surface of the hub about two inches. The main shaft was seventeen inches from the engine, and about two feet from the steam jackets.

On the morning of the injury one Gately, who appears by the evidence to have had charge of the works in the absence of the general superintendent, called to the plaintiff to help him put on a belt which had slipped off a pulley attached to the main shaft. The belt was put on but slipped off two or three times. Then Gately decided to put up a stick to keep the belt on, and said to the plaintiff: "I want you to go in there and block up that stick." The plaintiff went up a ladder to the platform of the car, and turned round from the ladder with his right foot between the air tank and the main shaft, a space seventeen inches wide, intending to step over the shaft, when his overalls were caught at the right knee and his clothes were stripped off by being wound around the old collar. He caught hold of an upright plank, but finally fell to the platform of the car and was injured. There was evidence from the plaintiff and Gately that there was another way to reach the place where the stick was, which would have been safe and would not have necessitated stepping over the shaft. The plaintiff further testified that he

had entire charge of the boiler and engine of the defendant's plant; that he knew the shaft was revolving and the machinery running; that he did not know that there was a set screw in the hub; that he did not know whether the hub was serving as a collar or not; that it might have been so serving; that he knew of the use of set screws in various places, that all machinery has them; that a pulley generally has a set screw; and that he did not know how near to the shaft he was when caught, as he was looking for the plank.

Upon this evidence we are of opinion that the ruling at the trial was right. The plaintiff was a man of experience; and, while he testified that he did not know of the existence of the old collar on the shaft, he had ample opportunity to ascertain its existence. The defendant was not bound to change his machinery or to point out to the plaintiff the fact of the existence of the set screw or the collar. The danger from the revolving shaft was apparent, and as such shafts have collars fastened to them by set screws, a fact well known to the plaintiff, his getting so near the shaft as to be caught was an act of negligence. Moreover he could have gone by a safer way, and, unless he chose to take the risk of stepping over a revolving shaft, he could have stopped the engine, over the running of which he had full control. *Demers v. Marshall*, 178 Mass. 9, and cases cited.

*Exceptions overruled.*

*J. J. Hogan*, for the plaintiff.

*F. E. Dunbar*, for the defendant.

## HARRY H. CARLISLE &amp; another vs. ELIHU LIBBY.

Suffolk. March 15, 1904. — April 2, 1904.

Present: KNOWLTON, C. J., LATHROP, HAMMOND, LORING, &amp; BEALEY, JJ.

*Real Action.*

Where on the trial of a writ of entry, it appears, that the demandant claims under an attachment and a subsequent sale on execution, and the tenant establishes his title through a foreclosure sale under a mortgage made before the bringing of the action in which the demandant's attachment was made, it is immaterial that the tenant also holds a deed from one whose title was acquired after the attachment, and evidence of an oral agreement alleged to affect the last named deed is not admissible in behalf of the demandant. Even if the tenant held under a deed subject to an oral agreement, this could not be proved in the real action, and the agreement would be enforceable in equity only on showing that the defendant in equity had knowledge of it.

WRIT OF ENTRY, dated April 17, 1899, for a parcel of land in Revere.

The plea was *nul disseisin*. The case was tried in the Superior Court before Aiken, J., without a jury. The judge found for the tenant, and, at the request of the demandants, reported the case for determination by this court. If the evidence offered by the demandants and excluded by the judge was excluded properly, judgment was to be entered for the tenant on the finding; otherwise a new trial was to be granted.

The report was as follows:

The demanded premises were purchased by Teresa S. Marshall some time in May, 1891. On June 8, 1894, she mortgaged the premises to one Dartnell for \$700 for six months, and on the same day made a second mortgage upon the same premises to one Trevelli, for \$3,000 for three years. On August 7, 1894, the demandants attached the premises on mesne process in an action of contract brought in the Superior Court for the county of Suffolk, and returnable therein the first Monday of September, 1894. On August 21, 1894, Mrs. Marshall conveyed the demanded premises to Jerome Rumery by a warranty deed in common form. This deed expressly stated that "this conveyance is made subject to a first mortgage to Mary E. Dartnell for

\$700, and a second mortgage to Emma T. Trevelli for \$3,000, also subject to the taxes for the years 1893 and 1894." It contained the covenant that she should "warrant and defend the same to the said grantee and his heirs and assigns forever, against the lawful claims and demands of all persons except as aforesaid." On September 17, 1894, Rumery conveyed the premises to the tenant, subject to two mortgages and to the taxes for the year 1894, covenanting to "warrant and defend the same to the said grantee and his heirs and assigns forever, against the lawful claims of all persons except as aforesaid." On December 7, 1894, Rumery obtained an assignment of the Dartnell mortgage and proceeded to foreclose that mortgage under the power of sale. This foreclosure was temporarily enjoined by the Superior Court on a bill in equity brought by the assignee in insolvency of Teresa S. Marshall, a demurrer to the bill was sustained, the injunction was dissolved and the mortgage was foreclosed June 15, 1895, by sale under the power of sale. The premises were conveyed by a mortgagee's deed to Benjamin B. Dewing, who conveyed them on the same day to Olive Rumery, wife of Jerome Rumery. On September 13, 1895, Mrs. Rumery conveyed to the tenant.

Mrs. Marshall filed a petition in insolvency on October 25, 1894. The attachment in the suit of *Carlisle et al. v. Marshall*, then pending in the Superior Court for Suffolk County, was continued for the benefit of creditors, by order of the Court of Insolvency on November 22, 1894. Mrs. Marshall was refused a discharge in insolvency on December 21, 1900. The demandants obtained a special judgment and execution issued.

The premises were sold by virtue of the attachment under mesne process on July 3, 1896, to Frank D. Emery, who, on December 16, 1896, conveyed them to the demandants.

The demandants offered the following evidence, by testimony of Teresa S. Marshall and Ernest H. Marshall, which was excluded by the judge:

That Jerome Rumery was an officer and director of the Rumery-Libby Company, a corporation organized under the laws of the State of Maine, and having its usual place of business in Portland, Maine. Elihu Libby, the tenant, owned forty shares of the stock of this corporation and was its president.

The other stockholders were Charles C. Libby, son of the tenant, who owned ten shares, and Jerome Rumery, treasurer of the company, who owned twenty-four shares. The Rumery-Libby Company was a creditor of Mrs. Marshall to the amount of \$1,800. The conveyance was made at the request of Rumery to secure that indebtedness and upon his promise to pay the two mortgages when due, the taxes, the attachment of the demandants and to reconvey to Mrs. Marshall, at such time within three years as she should satisfy the claim of the Rumery-Libby Company and reimburse him for his expenditures on account of the demanded premises. On or about October 25, 1894, Rumery made an appointment with the counsel for the demandants to pay off their claim in the original action against Marshall. The demandants' counsel went to the office of the counsel for the Rumery-Libby Company to receive payment and to discharge the attachment and suit against Mrs. Marshall. He was there informed that the claim could not be paid because Mrs. Marshall had just filed a petition in insolvency

*J. J. Higgins*, for the demandants.

*B. B. Dewing*, for the tenant.

LATHROP, J. We are of opinion that the evidence offered was rightly excluded. The title of the demandants was by virtue of an attachment made on August 7, 1894, in an action of contract, which we assume, though this is not clearly stated in the report, was against Mrs. Marshall. This title was subsequently perfected by a sale on execution on July 8, 1896. The land, however, at the time of the attachment, was subject to two mortgages, one made by Mrs. Marshall to one Dartnell, on June 8, 1894, for \$700, payable in six months, and another, made on the same day, to one Trevelli for \$3,000, payable in three years. The tenant does not claim title under the warranty deed from Mrs. Marshall to Rumery, of August 21, 1894, and the deed of September 17 of the same year, from Rumery to the tenant, but under a foreclosure of the mortgage given by Mrs. Marshall to Dartnell, which was assigned to Rumery on December 7, 1894, and foreclosed on June 15, 1895, by a sale to one Dewing under a power contained in the mortgage. Dewing on the same day conveyed the land to Mrs. Rumery, and on September 18, 1895, Mrs. Rumery conveyed it to the tenant.

There is nothing in the report to show that there was any contention that the Dartnell mortgage was not properly executed or that all the legal requirements were not properly complied with in the foreclosure sale. This sale gave the tenant a title superior to that of the demandants, and the fact that the tenant had a prior deed did not affect his title under the foreclosure.

There is nothing in the offer of proof relating to the oral agreement between Rumery and Mrs. Marshall, at the time when she made the conveyance to him, which can in any way bind the tenant, as he does not claim under this conveyance. Even if he did so claim, the evidence would not be admissible in this action. *Cranston v. Crane*, 97 Mass. 459. *Wilson v. Black*, 104 Mass. 406. Nor does the offer of proof tend to show that the tenant had any knowledge of the oral agreement between Marshall and Rumery.

*Judgment on the finding.*

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### CITY OF CAMBRIDGE vs. JOHN C. DOW COMPANY.

Middlesex. December 15, 1903. — April 4, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Equity Jurisdiction. Nuisance.*

The Supreme Judicial Court has no jurisdiction to entertain a bill in equity, to restrain a corporation from carrying on without a license the business of melting and rendering grease and tallow and making food for fowls from oysters and other sea shells, in a building where the business was established before May 8, 1871, the defendant never having killed horses or done any rendering of horses or other dead animals, and never having used or required in its business trucks or wagons for the removal of dead animals. Such a case is exempted from the provisions of R. L. c. 76, § 108; and *semble*, that § 111 of the same chapter does not apply to it, but, if it does, it provides only for fine or imprisonment and gives no remedy in equity.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 18, 1903, by the city of Cambridge, to restrain the defendant from carrying on the business of melting and rendering at its factory at 22 Portland Street in that city.

The case came on to be heard before *Morton, J.*, who, by

agreement of the parties, reserved it upon the bill and answer for determination by the full court, such orders and decrees to be entered as to the court should seem just and fit.

*G. A. A. Pevey*, for the plaintiff.

*G. L. Mayberry*, for the defendant.

LATHROP, J. This is a bill in equity in which the plaintiff seeks to have the defendant restrained by injunction from carrying on the business of melting and rendering on certain land in Cambridge. The case comes before us on the bill and answer. From these it appears that when the bill was filed, the defendant was carrying on, and had carried on continuously since 1860, in Cambridge, without a license, the business of melting and rendering of grease and tallow, and making food for fowls from oyster and other sea shells; but that the defendant never killed horses, and never did any rendering of horses or other dead animals, and never had used or required in its business trucks or wagons for the removal of dead animals. There was a board of health in Cambridge.

The principal question is whether the court has original jurisdiction in the matter. The court undoubtedly has jurisdiction to restrain a nuisance, but there is nothing in this bill to show that the trade carried on by the defendant is a nuisance, or that the board of health, under the powers given it by law, has passed any general or special order applicable to the case, and the R. L. c. 75, § 141, do not apply. The court also has power, aside from its general jurisdiction, when such power is given it by statute.

The plaintiff refers in its brief to the R. L. c. 75, §§ 73, 110, but these sections confer jurisdiction upon the Superior Court, and have no reference to this court. Nor is there anything in the R. L. c. 159, §§ 1, 2, which affects this case. Section 1 of this chapter gives to both courts "original and concurrent jurisdiction in equity of all cases and matters of equity which are cognizable under the general principles of equity jurisprudence." Section 2 gives to the Supreme Judicial Court "original and exclusive jurisdiction in equity of all cases and matters of equity which are cognizable under the provisions of any statute and are not within the jurisdiction conferred by the provisions of the preceding section, unless a different provision is made; and the



Superior Court shall have like original and exclusive, or like original and concurrent, jurisdiction only if the statute so provides."

The case presented by the bill might come within the R. L. c. 75, § 108, and the jurisdiction would be in the Superior Court, under § 110, but for the provision in § 108, that "the provisions of this section shall not apply to any building or premises which were occupied or used for said trades or occupations" on May 8, 1871.

The plaintiff further contends that the case comes within the R. L. c. 75, § 111, and that § 108 relates to places and § 111 to persons. But § 108 applies to persons as much as § 111. By its terms, "Whoever occupies or uses a building for carrying on therein the business of slaughtering cattle, sheep or other animals, or for a melting or rendering establishment," etc. without first obtaining permission of certain boards named, shall pay a certain penalty. Then follows the provision already cited as to buildings.

Section 111 is taken from the St. of 1901, c. 134, which began as follows: "Any person, firm or corporation engaged or desiring to engage in the business of killing horses, or in the rendering of horses or other animals, shall . . . make application to the board of health of the city or town where the business is to be conducted, for a license to carry it on." The language of the first part of this section was changed by the joint special committee on the consolidating and arranging of the Public Statutes so as to read: "A person, partnership or corporation engaged in or desiring to engage in the business of killing horses, or in the carrying on of a melting or rendering establishment" etc., and in this form the Legislature enacted the law. It may well be doubted, however, whether any change in the law was contemplated either by the committee or the Legislature, or whether any change was in fact made. The rest of the section, which retains the language of the St. of 1901, shows that the section has no application to an establishment such as the defendant was carrying on, but was intended to apply to a melting and rendering establishment used in connection with dead horses or other large animals. Thus before granting a license, the board of health must be "satisfied that the applicants have a suitable

building and plant in a situation approved by said board and that they have suitable trucks or wagons for the removal of dead animals." The board of health is also required to notify the board of cattle commissioners of the granting of any such license. The licensees are required to report to the board of cattle commissioners every animal received by them which is found to be infected with a contagious disease. There is also this further provision: "No unlicensed person shall carry on the business of killing horses or of melting and rendering." It seems to us reasonably clear that "melting and rendering" refers to horses or other large animals whose bodies are received before they are dismembered, and that other kinds of melting and rendering were supposed to be covered by § 108. However this may be, the remedy provided for a violation of the section is a fine or imprisonment, and nothing is said as to any other judicial remedy.

As the plaintiff has not brought the case within the general equity jurisdiction of the court or within any statute giving this court jurisdiction, the order must be

*Bill dismissed.*

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JAMES G. WHITE vs. NEAL E. McPECK & another.

Suffolk. March 8, 4, 1904. — April 4, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

*Partnership. Insurance, Life, Waiver of forfeiture. Contract, Consideration.*

If by the terms of the partnership agreement between two partners it is provided, that each shall take out an insurance policy on his life payable to the other and that these policies shall be kept in force, the premiums on such policies as between the partners are partnership debts.

If a policy of life insurance by its terms becomes void on a failure to pay premiums at maturity, and provides that no agent can extend the time for payment of premiums and that the contract cannot be altered except by the written agreement of the company signed by one of certain officers named, yet, if the company accepts payment of premiums after they are due, the lapse of the policy for failure to pay the premiums is waived.

A promisee by an insurance agent to pay the premiums due from each of two partners on certain insurance policies out of his own funds, the payment of the premiums being required from each partner by the terms of the partnership

agreement, is a good consideration for a promissory note of the partnership given to the agent by one of the partners for the amount of the premiums.

In an action on a promissory note signed in the name of a partnership by one of two partners and disputed by the other, it was held that a certain ruling requested by the defendant was refused rightly, in view of the fact that there was evidence of authority to give the note in behalf of the partnership and also of ratification by the other partner after the note was signed.

CONTRACT on a promissory note for \$176. Writ in the Municipal Court of the City of Boston dated September 9, 1902.

On appeal to the Superior Court the case was tried before *Aiken, J.*, without a jury. The judge refused the defendant Braman's requests for rulings which are stated in the opinion, and found for the plaintiff in the sum of \$182.62. The defendant Braman alleged exceptions.

*W. M. Lindsay*, for the defendant Braman.

*T. W. Proctor*, for the plaintiff.

LORING, J. This is an action on a promissory note dated July 15, 1902, signed McPeck and Company. The defendants McPeck and Braman at that time were partners. The plaintiff put in evidence showing that he was and is the agent of the Travelers Insurance Company; that McPeck and Braman became partners on February 8, 1902; that before this partnership was formed McPeck had been doing business with one Alexander as a partner; that on February 8 McPeck held a policy on the life of Alexander in the Travelers Insurance Company represented by the plaintiff, payable to him, McPeck, and Alexander held a policy on McPeck's life payable to him, Alexander. When Braman became a partner of McPeck and Alexander ceased to be a partner Braman asked to have the policy on McPeck's life transferred to him and this was done "in consequence of his request," in the words of McPeck in his testimony. McPeck's testimony immediately after this is as follows: "Subsequently he took out this policy payable to me; this was one of the agreements between us." The third quarterly premium on the policy payable to Braman fell due April 24, 1902, and the second quarterly premium on the policy payable to McPeck fell due June 15. On or about July 2, the plaintiff sent his bookkeeper to demand the premiums; he returned and reported that Braman told him that he and McPeck had decided not to continue the insurance any longer. A day or two afterward the plaintiff saw

McPeck and said to him that he was surprised that Braman and he were not going to continue "this partnership agreement which you made," and on being asked what he meant replied, "Braman told my bookkeeper the other day that you had decided not to continue that insurance any longer." To which McPeck replied that "if Braman told you that, it is untrue; we have had no such conversation and I fully intend to keep up this insurance, and Mr. Braman, if he carries out the agreement which we made originally, should carry out his part of the contract, and if you will accept a partnership note, — it is not convenient for me to give you a check to-day for those premiums — but if you will accept a partnership note I will give it to you." In pursuance of this conversation the note sued on was given and the plaintiff, on July 29, paid the premiums to the company out of his own money.

At the trial in the Superior Court the defendant McPeck was defaulted and Braman introduced no evidence material on the matters now before us.

Braman asked the judge to rule (1) that on the facts the note was not given for partnership purposes, (2) that it was without consideration and (3) "that if the plaintiff or his agent received notice from the defendant Braman that he, the defendant Braman, did not wish to continue the expense incident to the policies of insurance in question, and subsequently, without the assent of said Braman, the plaintiff secured from the defendant McPeck the note in question, such action on the part of the plaintiff was in fraud of the defendant Braman, and the plaintiff cannot recover against the defendant Braman."

The defendant contends in support of the first ruling asked for that the application for each policy having been made by the person insured the premium was due from each and was not a partnership debt, and that this conclusion is reinforced by the provision contained in each policy that the person taking out the policy can revoke the designation of the beneficiary at pleasure. But there was evidence that one of the terms of the partnership agreement between McPeck and Braman was that these policies should be taken out and kept in force. That made the premiums as between the partners' partnership debts.

In support of the second ruling asked for, the defendant Bra-

man contends that by its terms the policy became void on the premiums not being paid at maturity, and that it appears on the face of the policy that no agent can extend the time for payment of premiums, nor can the contract be altered except by the written agreement of the company signed by the president, vice-president, secretary or assistant secretary. But if the company subsequently accepted the money due as premiums, the lapse of the policy for the failure to pay them would be waived. The conversation in which the plaintiff agreed to take a note warranted the judge in finding that he agreed to forward to the company the premiums out of his own funds; that promise was a valid consideration for the note.

We are of opinion that on a fair construction of the third ruling asked for, the question presented by it is whether the giving of the notice prevented the plaintiff from recovering on this note, if Braman originally agreed to keep these policies in force and never in fact decided to break his agreement and the plaintiff in good faith believed such to be the fact, or if the giving of the note was ratified by Braman after it was given. In addition to the evidence already stated, McPeck testified and this testimony was uncontradicted: "I told Mr. Braman before we signed the note we would have to sign and pay it and we would pay it; I did not say what we would do; I told him I had signed it after it was done and he made no objection to it."

In this state of the evidence we think that the words "and subsequently, without the assent of said Braman, the plaintiff secured from the defendant McPeck the note in question," refers to an assent on Braman's part having been expressly given by Braman after the notice was given, and does not refer to there having been originally an agreement to keep up the policies and no deliberate decision by Braman to break it, nor to the note having been ratified by him after it was given.

*Exceptions overruled.*

## CHARLES F. COGSWELL vs. NEWBERT J. HALL, executor.

Norfolk. January 12, 1904. — April 7, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Practice, Civil, Amendment. Limitations, Statute of. Evidence, Declarations of deceased persons.*

On a motion to amend the declaration in an action against an executor, the fact that a new action for the cause stated in the amendment would be barred by the special statute of limitations, so far from being a ground for denying the motion, is a reason for allowing the amendment.

It is within the discretion of a presiding judge to determine the stage of the trial at which an amendment shall be allowed.

On a motion to amend a declaration the decision of the presiding judge is final upon the question of fact whether the plaintiff intended to include the substance of the amendment in his demand.

In an action by a son against the executor under the will of his mother, upon an oral promise alleged to have been made to the plaintiff by his mother to pay to the plaintiff on certain terms the proceeds of certain real estate left by the father of the plaintiff, who died intestate, the defendant, to show that his testatrix had furnished half of the money for the purchase of the real estate in the name of her husband, thus creating a resulting trust, may introduce under R. L. c. 175, § 67, as declarations and conduct of the testatrix, evidence of a conversation between the testatrix and her husband in the presence of the witness, about the amount of the purchase price of the property, and the amounts of money which the husband and wife put into it. If it appears that in settling her husband's estate the testatrix never claimed a resulting trust, this affects merely the weight of the evidence as to her declarations but not its admissibility.

CONTRACT against the executor under the will of Hannah Etta Cogswell, mother of the plaintiff, on an alleged oral agreement made with the plaintiff by the defendant's testatrix. Writ dated June 30, 1902.

At the trial in the Superior Court before *De Courcy, J.*, the jury returned a verdict for the plaintiff in the sum of \$9,816.41. The defendant alleged exceptions raising the questions stated by the court.

*M. Coggan & G. L. Dillaway*, for the defendant, submitted a brief.

*F. E. H. Gary & J. B. Sullivan, Jr.*, for the plaintiff.

BRALEY, J. On the death of his father the plaintiff who appears to have been his only heir at law entered into an agreement with his mother of whose will the defendant is executor, by which

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she received the sum of \$6,000, being the price of certain real estate left by her husband who died intestate, and which was subject to her right of dower. The details of the transaction are not fully disclosed, but from the testimony of the plaintiff it may be inferred, that of this sum she was to have the income of \$2,000 during her life, in place of her life interest in the land, and at her death the principal was to be paid to him. The remainder of the money she retained as a loan from him, on which she was to pay interest, but neither the time when the debt became payable, nor the rate to be charged, appears in the bill of exceptions, and the only witness to the alleged contract was the plaintiff. As the original declaration did not contain a count declaring specifically for the money that represented the value of her estate in dower, held by her at her death, an amendment was offered, and allowed, in which this part of the plaintiff's claim was set out in a separate count. The defendant apparently opposed the allowance of this amendment, upon the ground that it "introduced a new cause of action which would otherwise be barred by the statute limiting actions against executors to two years after their appointment", though there is no statement in the bill of exceptions giving the date of the appointment of the executor, or that he had given the notice required by statute. R. L. c. 139, § 1; c. 141, § 9.

Instead of this being a conclusive reason in favor of its disallowance, it might well be considered a sufficient cause for its being granted, for otherwise the plaintiff might lose a meritorious claim.

The other objection, that the conditions stated at the beginning of the trial had not arisen under which the amendment should be allowed, was wholly within the discretion of the presiding judge, as well as the further question of fact raised by the defendant, whether the plaintiff when he brought his action intended to include the substance of the new count as a part of his demand.

This objection becomes of slight importance when it appears that the first count of the declaration included all the items for the full amount, as money had and received to the plaintiff's use. But the principal held by her as a substitute for her dower was not received to his use, and under the agreement made with him

he would become entitled to its possession as his separate property only at her death. *Driscoll v. Holt*, 170 Mass. 262. *Adams v. Weeks*, 174 Mass. 45, 46. *Golding v. Brennan*, 183 Mass. 286, 289.

To meet this difficulty, and enable the plaintiff to maintain his action for the cause for which it was brought, the amendment was allowed properly.

The remaining exception relates to the exclusion of evidence offered by the defendant, that his testatrix originally contributed \$3,000 towards the purchase of the land, and had the right to appropriate to her own use, upon receipt of the price for which it sold, so much as would repay her this amount.

The plaintiff's case rested upon his testimony of an express agreement with his mother. He took the position, that as heir at law of his father he became entitled at the time of sale to two thirds of the money received by her, and at her death to the remainder; and it was open to the defendant to prove, that when the property was originally bought Mrs. Cogswell contributed an aliquot part of the purchase price. *Skehill v. Abbott*, 184 Mass. 145.

If so, and the money advanced by her was not a gift to her husband, there was a resulting trust in her favor, which she could have established, if necessary, by a bill in equity against him. *Livermore v. Aldrich*, 5 Cush. 431, 435. *Hayward v. Cain*, 110 Mass. 273, 277. *Lombard v. Morse*, 155 Mass. 136. *Frankel v. Frankel*, 173 Mass. 214.

And the plaintiff who claims title to the estate, either as land, or the proceeds of its sale, takes by inheritance subject to the trust. *Day v. Worcester, Nashua, & Rochester Railroad*, 151 Mass. 302, 307. *Holland v. Cruft*, 3 Gray, 162, 180. *Dana v. Dana*, 154 Mass. 491. *Rines v. Bachelder*, 62 Maine, 95.

From the discussion appearing in the bill of exceptions, when this evidence was offered by the defendant it was excluded, for the reasons that the inquiry was collateral to the general issue of indebtedness then on trial, and, as she settled her husband's estate upon his death and never claimed a resulting trust, her conduct was legally inconsistent with the position taken by her executor.

But such a view only affects the weight to be given to the



evidence, and leaves the question of admissibility untouched; for the jury were not obliged to believe the testimony of the plaintiff, and his evidence could not be treated as absolutely establishing the business relation between him and his mother, to which he had testified.

His case rested upon an express promise made by her to pay to him the price of the land under the terms already stated. By way of reply to this claim, and to support his defence, that at least one half of the amount that came into her possession was due to her, in repayment of money advanced at the time when the estate was bought, the defendant was clearly within the statute permitting proof, not only of declarations made by her, which would include the conversation between herself and husband in the presence of a third party, but also of her conduct as being inconsistent with such a contract, and thus tending to contradict it. R. L. c. 175, § 67. *Brooks v. Holden*, 175 Mass. 137, 140. *National Granite Bank v. Tyndale*, 179 Mass. 390, 395.

*Exceptions sustained.*



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ELLEN M. REGIS & another vs. H. A. JAYNES AND  
COMPANY & others.

Suffolk. January 21, 1904. — April 11, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Equity Pleading and Practice*, Master's report. *Trade Name. Equity Jurisdiction.*

Where a master's report does not state all the evidence, the master's findings of fact cannot be revised if warranted by the evidence stated in his report.

One, who has established the right to the use of the word "Rex" as a trade mark or trade name designating dyspepsia tablets, may maintain a suit in equity against a person using the word "Rexall" to designate similar dyspepsia tablets, although the defendant began the use of that word innocently without intention of imitating the trade name of the plaintiff, if, after notice of injury to the plaintiff, the defendant continues to use the word "Rexall" in such a way that the public are likely to be misled, and an injunction will be granted to restrain the defendant from such unlawful use of the word in the future, whether the plaintiff has suffered pecuniary injury before the filing of his bill or not.

BILL IN EQUITY, filed June 12, 1903, to restrain the defendants from using the word "Rex" or the word "Rexall" alone or with other words in connection with the manufacture and sale of dyspepsia tablets.

The case was referred to Arthur D. Hill, Esquire, as master. The master found for the plaintiffs, and the case came on to be heard before *Bralley, J.* upon the master's report and the defendants' exceptions thereto. The defendants' exceptions other than the fourth having been waived, the justice reserved the case upon the master's report and the fourth exception thereto for determination by the full court.

The fourth exception was as follows: "For that the master found that the word 'Rexall', as applied to a remedy for dyspepsia, is so similar to the word 'Rex', as used by the plaintiffs in connection with the sale of their medicine, that persons not familiar with the exact appearance of the plaintiffs' remedy and the appearance of the boxes and labels with which it is sold, and using such care and observation as the public generally are capable of using and may be expected to use in such a matter, are likely to mistake one for the other."

*R. F. Herrick, (H. L. Burnham with him,)* for the defendants.  
*A. P. Hardy,* for the plaintiffs.

*BRALLEY, J.* When the plaintiff, Ellen M. Regis, first compounded her preparation in the form of pills she marked on the boxes in which they were sold the word "Rex", from which her family surname was derived. She not only adopted and attached it as the distinctive feature indicative of the origin, identity and proprietorship of her cure for dyspepsia, but filed it as a trade mark under St. 1895, c. 462, § 1. No evidence appears that at any time she has abandoned or ceased to use it, but the contrary is true. She has formed a partnership with her son, and from small sales in its original form and within a circumscribed territory other and more attractive combinations have been made, and the business has slowly increased in value and extended into larger fields. This is enough in the present case to establish an exclusive right of property in the plaintiffs to the device or name used in their business. *Burt v. Tucker*, 178 Mass. 493. *Lawrence Manuf. Co. v. Tennessee Manuf. Co.* 138 U. S. 537.

It may be conceded that words which are merely descriptive

of the style and quality of an article cannot be appropriated and used for this purpose by the manufacturer in the description of his wares to the exclusion of a similar use by others; but any words or devices that have for their principal object to make plain the identity of the owner with the specific goods prepared and sold by him are not so classed, but may constitute a valid trade mark. *Lawrence Manuf. Co. v. Lowell Hosiery Mills*, 129 Mass. 325, 327. *Frank v. Sleeper*, 150 Mass. 583. *Samuels v. Spitzer*, 177 Mass. 226. *Lawrence Manuf. Co. v. Tennessee Manuf. Co.*, *ubi supra*. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460.

Although the subsequent origin of the mark or name used by the defendants on their cure for dyspepsia is not stated, it is found that it was not originally intended as an imitation of that of the plaintiffs, but may be considered as a fanciful term invented by the United Drug Company, and which was used to denote a particular proprietary medical compound put up and sold by it or its licensees.

But if no intention to wrongfully injure the plaintiffs is manifested in the origin of "Rexall", this does not constitute a defence where priority of ownership and continuous use is shown of the device or mark of which it is found to be an imitation, and buyers are likely from the resemblance to be misled and purchase the defendants' cure when they desire to buy and believe they are getting the remedy made by the plaintiffs. *Gilman v. Hunnewell*, 122 Mass. 139. *Burt v. Tucker*, *ubi supra*. *North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83.

A mere comparison of the different words, devices or designs which may be used for the purpose of a trade mark is not enough to make out the main fact to be proved, but the plaintiffs must go further and establish the essential proposition on which a case like this depends; that taking all the circumstances, the form of manufacture, names, labels, shape of boxes or receptacles in which they are sold, there exists a reasonable probability that purchasers using ordinary care will be deceived by the similarity of names and led into mistaking one medicine for the other. *McLean v. Fleming*, 96 U. S. 245.

Among the various findings and rulings made by the master,

the only one now material is that in which he decides this principal issue of fact, and to which the single exception argued by the defendants was taken.

An examination of the report shows that the remedies are compounded in the form of two kinds of tablets, to be taken in connection with each other, and in this respect there was a likeness between them, though the boxes used for each in form and the labels attached are so dissimilar that persons of ordinary intelligence, if no further resemblance was found, could easily distinguish them, yet upon the whole, in connection with the similarity of names, the similitude becomes such that purchasers not familiar with the exact appearance of each, and the boxes and labels with which they are sold, and exercising the care and observation of the average buyer, are likely to mistake the defendants' preparation for that of the plaintiffs.

This finding is well supported by the evidence and subsidiary findings stated in the report, and under our rule where all the evidence is not reported, therefore becomes final and is not to be disturbed. *East Tennessee Land Co. v. Leeson*, 183 Mass. 37, 38.

But the master further determined that within a common territorial area, the United Drug Company, with the knowledge and consent of the defendants who are represented in the advertisements as sole agents for its sale, has advertised, while the defendants to a very limited extent have sold, this medicine as a specific for the same disease, but it did not affirmatively appear that such competition in trade at the time the bill was filed had led to any actual injury to the business of the plaintiffs, and for this reason he declined to assess damages. Presumably their prompt action, which did not allow sufficient time to pass before suit to ascertain the effect on their trade, had, to a very large degree, forestalled results which they feared might follow from, and probably would have been caused by, the unauthorized acts of the defendants.

If at common law an action for damages caused to a manufacturer whose goods were put upon the market under a trade mark and had acquired a distinctive value and reputation, could be maintained against another trader who fraudulently copies and places on the goods made by him a similar mark or label,

in equity relief can be granted not only as to damages already suffered, but an injunction can be awarded restraining such unlawful use in the future. *Thomson v. Winchester*, 19 Pick. 214. *Marsh v. Billings*, 7 Cush. 322, 332. *Lawrence Manuf. Co. v. Lowell Hosiery Mills*, *ubi supra*. *Holbrook v. Nesbitt*, 163 Mass. 120.

If the choice of the trade device used by the defendants was innocent and not copied from the name used by the plaintiffs, yet it appears, and the master has found, that after notice given to them that their continued use of it was wrongful, because of the fact that it was an imitation of the plaintiffs' trade mark, they still allowed their names to appear in the same form of advertisement, and continued to sell their preparation without any change of name, shape or label. Such conduct of itself affords strong presumptive evidence of fraud. *Orr v. Johnston*, 13 Ch. D. 434. And their acts from that time at least must be considered as a direct and intentional infringement. *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.* 168 Mass. 154. *American Waltham Watch Co. v. United States Watch Co.* 173 Mass. 85. *Flagg Manuf. Co. v. Holway*, 178 Mass. 83. *Viano v. Baccigalupo*, 183 Mass. 160. *Upmann v. Forester*, 24 Ch. D. 231. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218.

Although the master has decided that the plaintiffs have not yet suffered any monetary loss, equity interferes when title and successful imitation have been established to prevent the impairment or destruction of the right itself, notwithstanding it may also be found that the reputation and use of the plaintiffs' remedy may be confined to a relatively small section of the State when compared with the field occupied by the defendants, and probably is less widely known and sold, and much inferior to their specific in popularity. Such a disparity in volume of trade, or in reputation, if held to be decisive as a limitation of the extent to which relief should be granted, affords no opportunity ordinarily for the organization and development of a business, though founded on a valid trade mark, where from a small and feeble beginning, if not subjected to unlawful interference by rivals, it may become a large and profitable enterprise, which the owner has a right to foster and establish. For the injury

suffered in such a case is the same in kind, though it may differ in degree. *Shaver v. Shaver*, 54 Iowa, 208, 210, 212.

While the public are deceived and buy the spurious production in the belief that the imitation is the original article, yet the jurisdiction to award an injunction may well rest on the ground, that where a substantial business has been built up, the output of which has become known to buyers under a designated device or name, such designation, when lawfully established, whether treated technically as a trade mark or trade name, is property in the same sense as the instrumentalities which the owner uses in making the specific thing that he vends in the market in this form. So that the proprietor of such a trade product, if another without authority uses similar devices intending to represent by them that the goods are identical, is entitled to protection from this wrongful and fraudulent appropriation of his property. *Weener v. Brayton*, 152 Mass. 101. *Bradley v. Norton*, 33 Conn. 157. *McLean v. Fleming*, *ubi supra*. *Hall v. Barrows*, 32 L. J. Ch. (N. S.) 548, 551. *Millington v. Fox*, 8 Myl. & Cr. 388.

As the plaintiffs have made out a case, they are entitled to an injunction to prevent and restrain further interference with the use and enjoyment of their property, and the defendants' exception to the master's report must be overruled and the report confirmed.

*Decree for the plaintiffs accordingly.*

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WALKER ICE COMPANY *vs.* AMERICAN STEEL AND WIRE  
COMPANY.

Worcester. September 30, 1902. — May 17, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Landlord and Tenant. Easement. Practice, Civil. Evidence.*

A lease to a manufacturing company, operating a steam plant, of an artificial pond  
"to be used for flowage purposes only . . . with the exclusive right to flow,

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store and use water in said pond" to a certain height, reserving the exclusive right to cut and sell ice from the pond, grants only the right to store and use the water in its natural condition, and does not give the lessee the right to turn into the pond hot water from its condensers and store it there so as to melt the ice, although this may be reasonably necessary for the proper operation of its steam plant. **LORING, HAMMOND, & BRALEY, JJ.** dissenting on the ground that, if the evidence shows that the right to turn hot water into the pond is necessary to keep the steam plant in operation, such a right is included in the grant, and that the exclusion of evidence tending to show this fact is erroneous.

The owner of an artificial pond, which he has leased to a manufacturing company with the exclusive right to store and use water there at its natural temperature, reserving the exclusive right to cut ice from the pond as used in connection with certain land and buildings owned by him adjoining the pond, may give orally to a tenant at will, holding over after the expiration of a lease in writing of the land and buildings and the right to cut ice in connection therewith, all the rights which he has enjoyed under his lease, and in such case the tenant at will has not a mere license to cut ice but a property right in the ice before it is cut, and may maintain an action against the manufacturing company for destroying an uncut crop of ice by turning into the pond hot water from its condensers. **LORING, HAMMOND, & BRALEY, JJ.** dissenting.

It is proper to refuse a request for an instruction which assumes as a fact one of the matters in controversy.

Conversations between the owner of land and one claiming to be a tenant at will of the land are admissible for the purpose of showing the existence of the tenancy at will and what is included by its terms, and it is no objection to the admission of such evidence that it tends to vary the terms of a lease from the owner of the land to another person claiming adversely to the alleged tenant at will.

No exception lies to the exclusion of evidence if the same evidence in substance already has been admitted without objection and it does not appear that the party offering the evidence has been harmed by the exclusion.

Evidence of the course of conduct of the parties to a lease admissible to show the construction put upon it by them is confined to the conduct of the lessor and lessee and those claiming under them, and does not include evidence of the conduct of the lessee and of one claiming a right adverse to the lessee as tenant at will of the lessor, where it does not appear that the lessee was acting under a claim of right or that such a claim was acquiesced in by the lessor or that the lessor knew of the conduct of the lessee.

**TORT** for the alleged destruction of an uncut crop of ice on Salisbury Pond in Worcester by great quantities of hot water poured into the pond by pipes and conduits from the defendant's factory. Writ dated June 16, 1900.

In the Superior Court the case was tried before *Hopkins, J.* Certain evidence described and referred to in the opinion of the court and in the dissenting opinion was offered by the defendant and excluded by the judge subject to exceptions by the plaintiff. The defendant requested the following rulings:

"1. That upon the evidence the plaintiff has established no cause of action on the pleadings, and the verdict must be for

the defendant. 2. That upon the evidence the plaintiff cannot maintain its action against this defendant. 3. That the defendant had the exclusive right to use the waters of Salisbury Pond in any manner. 4. That if the defendant used the waters of the pond only in such manner as was reasonably necessary for the carrying on of its business, then even though such use prevented the plaintiff from taking ice, the defendant was within its legal rights, and the plaintiff has established no cause of action. 5. That the plaintiff had no exclusive right to take ice from Salisbury Pond in January, 1900. 6. That any right the plaintiff had to cut or take the ice in January, 1900, was subordinate to the defendant's exclusive right to use the entire waters of Salisbury Pond for any purpose. 7. That the extent of the plaintiff's right to cut or take ice was limited to such opportunity to cut or take the same, subordinate to the right in the defendant to use the entire waters of the pond. 8. That the only right the plaintiff had to take or cut ice was limited to such opportunity as might exist, subject to the defendant's right to use the entire waters of the pond. 9. That under the lease to the defendant's admitted predecessor in title, in January, 1890, no valid reservation was created, and the lessee took the entire waters of the pond, subject to no restriction or reservation. 10. That under the lease of 1890, the plaintiff took, and has, no right under the words of reservation. 11. That under the lease of 1890, the defendant had the exclusive right to use, store, or flow the water into Salisbury Pond without any regard to the taking of ice by the plaintiff. 12. That the evidence that the defendant, or its predecessors in title, at the request of the plaintiff or its predecessors, suspended temporarily the return of water to Salisbury Pond, cannot be taken as establishing any right of the plaintiff as against the defendant."

The judge refused to make any of these rulings. The jury returned a verdict for the plaintiff in the sum of \$12,000; and the defendant alleged exceptions, which after the death of *Hopkins, J.* were allowed by *Gaskill, J.*

The case was argued at the bar in September, 1902, before *Morton, Lathrop, Barker, & Loring, JJ.* of the present court and also *Holmes, C. J.*, and afterwards was submitted on briefs to all the justices.



*H. Parker, (G. A. Gaskill with him,) for the defendant.*

*A. P. Rugg, (W. C. Mellish with him,) for the plaintiff.*

MORTON, J. This is an action of tort to recover damages for the alleged destruction by the defendant of a crop of ice on Salisbury Pond in Worcester which the plaintiff was preparing to harvest. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the admission and exclusion of evidence, and to the instructions that were given and refused. The plaintiff contended that the ice was destroyed by the turning into the pond by the defendant of hot water from its condensers. The defendant admitted turning in hot water but denied that the destruction of the ice was caused thereby; the verdict must, however, be taken to have settled this issue against it.

Salisbury Pond is an artificial pond. It and the premises on the shore occupied by the plaintiff and its predecessors formerly belonged to Stephen Salisbury, Sr., and on his death in 1884 passed to his son Stephen Salisbury, Jr., the present owner. The pond was originally established and is principally used to furnish water for manufacturing purposes. But for upwards of thirty years, the plaintiff and its predecessors, first as tenants of Stephen Salisbury, Sr., and then of the son, have occupied the premises on the shore of the pond for the ice business, and have cut and taken ice from the pond in connection therewith. Formerly this tenancy was under written leases. The last written lease that was put in evidence by the plaintiff was one from Stephen Salisbury, Sr., to Benjamin Walker in 1878 for five years. Upon its expiration it was extended in writing for three years more upon the same terms and conditions. The extension expired in 1886 and since then the plaintiff and its predecessors have occupied the premises and cut and taken ice upon the same terms and conditions as contained in the lease of 1878, except that each was to give the other six months' notice of an intention to terminate the tenancy. The lease of 1878 bounded the premises in part on the shore of the pond, and provided that "the premises are to be used for a dwelling house and other buildings for the ice business during the term of this lease, as at the present time." It also contained a provision that the "said Salisbury doth also lease to said Walker the right to cut

and take ice from Salisbury's Pond as is done at this time during the term of this lease," and a further provision that in addition to the stipulated rent the lessee should "deliver to the lessor as much ice as shall be required for two families during the term of this lease, as is done at this time." The plaintiff has paid the rent and has done all the other things required. As we construe this lease it demised the premises on the shore of the pond with the privilege of cutting and taking ice as appurtenant thereto. The rent reserved was not apportioned between the premises and the right to cut and take ice, but consisted of a round sum; and this taken in connection with the situation of the premises on the shore of the pond, and the provision that they were to be used for the ice business, renders, it seems to us, the construction which we have given to the lease the only reasonable one. See *Huntington v. Asher*, 96 N. Y. 604. Strictly speaking a right to cut and take ice is, perhaps, more in the nature of a *profit à prendre* than an easement, though it comes within the definition of an easement which was given by Chief Justice Shaw in *Ritger v. Parker*, 8 Cush. 145, 147, and which was quoted with approval by the court in *Owen v. Field*, 102 Mass. 90, 103. But whether regarded as an easement, or as a *profit à prendre*, the right was capable of being annexed to the premises which were demised (see *Huntington v. Asher, ubi supra*), and must be considered, we think, according to the true construction of the lease as having been so annexed. Upon the termination of the written lease, the occupancy did not cease, but the relation of landlord and tenant continued between Mr. Salisbury and the parties in possession,—the only difference being that instead of being in under a written lease and for a fixed term, they were in by parol and as tenants at will. In holding over whether by mutual consent and agreement or otherwise they held the same premises with all the rights and privileges that had been annexed to them, and upon the terms and conditions specified in the written lease, except so far as modified by mutual arrangement. *Dimock v. Van Bergen*, 12 Allen, 551. *Weston v. Weston*, 102 Mass. 514, 518. *Webber v. Shearman*, 3 Hill, (N. Y.) 547. They were not in any sense licensees, but were tenants at will. And if the landlord had deprived them of the right to cut and take ice, it would have

constituted a substantial interference with their right of quiet enjoyment, if not an eviction. *Brown v. Holyoke Water Power Co.* 152 Mass. 463. *Case v. Minot*, 158 Mass. 577. The occupation has been a continuous one since the expiration of the lease, and the successive changes rendered necessary by death and the taking in of new partners and the change from a partnership to a corporation have not interrupted the tenancy, and have all been agreed to by Mr. Salisbury. If the case had stopped here, there can be no doubt, we think, that the plaintiff had such possession of the ice that the defendant would be liable for the damage done in causing its destruction by turning hot water into the pond.

But the case does not stop here. The defendant claims under a written lease from Mr. Salisbury, of what it asserts is the pond and the land under it, to the Washburn and Moen Manufacturing Company, to whose rights it is admitted that the defendant has succeeded, and it contends that under this lease it had the right to turn in hot water, and that if the plaintiff has a right to cut and take ice, which it denies, the right is subject to its right to flow, store and use the water of the pond for manufacturing purposes. It also contends, and this is the ground on which it denies the plaintiff's right to cut and take ice, that the plaintiff derives any right or privilege that it has to cut and take ice from the reservation to Mr. Salisbury contained in the lease, that that created an easement in gross in favor of Mr. Salisbury which could only pass by grant, and that, having no grant, the plaintiff was only a licensee, and, not having reduced the ice to possession at the time when it was destroyed, has no cause of action against the defendant. This renders it necessary to consider the lease under which the defendant claims. If the construction contended for by the defendant is correct, it is manifest that the conclusion for which it contends must follow. But we do not think that the construction for which it contends is correct.

Omitting what is not essential in the consideration of the case before us, what was demised by the lease to the Washburn and Moen Company was "that tract of land lying on the westerly side of said Grove Street as shown on a plan recorded herewith . . . comprising the area known as Salisbury Pond, to be used

for flowage purposes only . . . with the exclusive right to flow, store and use water in said pond by means of its dam and flash boards, at a height," etc. Later in the lease is the following reservation: "The said lessor for himself, his heirs, executors, administrators and assigns reserves the exclusive right to cut, harvest, sell or store for sale, ice from said Salisbury Pond, as at present exercised by B. Walker & Company during the lease or its extension." The lease was dated January 31, 1890, and was for twenty-five years from July 1, 1888. There had been an earlier lease from Mr. Salisbury, Sr., to the Washburn and Moen Company which was offered in evidence by the defendant and excluded subject to its exception. This lease was dated the first day of July, 1868, and expired on the same day as that, under which the defendant now claims, took effect. What was demised by that lease was "all the water in Salisbury Pond on the north side of Grove Street . . . to be used for manufacturing purposes . . . subject to the reservation hereinafter expressed." The reservation so far as material was as follows: The "said Salisbury reserves to himself, his heirs and assigns, during the term of this lease, the right to take ice from the pond as heretofore." The Washburn and Moen Company was and is a large manufacturing establishment, which the defendant operates, and the water taken from the pond is used for steam and condensing purposes.

The first question is whether the defendant had the right under its lease to turn hot water into the pond as it is found that it did. We do not think that it had. No doubt, if Mr. Salisbury had seen fit to do so, he could have leased the pond and the land under it to the Washburn and Moen Company or to the defendant, so as to give it the right to turn in hot water, and have made the right to cut and take ice subject thereto, leaving the plaintiff and its predecessors to such remedy, if any, as they might have against him. But it does not seem to us that he has done so. The lease contains an express reservation to himself, his heirs and assigns, of the right to cut and take ice as at present exercised by B. Walker and Company. The earlier lease that was offered and excluded contained a similar reservation. The effect of these reservations is to rebut any intention on his part to give the Washburn and Moen

Company a right in the waters of the pond or in the pond itself superior to the right to cut and take ice. And the reference to B. Walker and Company, though that was not the style of the firm then carrying on the ice business, which was the Walker Ice Company, a successor to B. Walker and Company, shows plainly, it seems to us, a purpose on his part to protect the rights of those in occupation of the premises on the shore of the pond and engaged in cutting and taking ice, from interference therewith on the part of the Washburn and Moen Company, and to make the rights demised to that company in the waters of the pond subject to the right to cut and take ice. The reservation is in the nature of an exception and should be so construed. *Hamlin v. New York & New England Railroad*, 160 Mass. 459. Even if, therefore, the lease gave to the defendant the right to turn in and store hot water, we think that the right was subject to the plaintiff's right to cut and take ice.

But we do not think that there is anything in the lease or the circumstances under which it was executed which gave to the Washburn and Moen Company the right to turn in and store hot water, though no doubt it might do so, so long as nobody interested objected. The lease demised the pond and the land under it for flowage purposes only with the exclusive right to flow, store and use the water as high as a certain bolt. There is nothing, in terms at least, which gives the right to turn in and store hot water, and we think that the rights that are given have reference to water in its natural condition as it comes in the ordinary course of nature, from the ponds and streams in which it has gathered, to the dam and is held back by that to the height prescribed. This is the natural construction, particularly of the right of flowage, and there is nothing to show that the language was used in any other sense or should receive a different construction. The fact that the defendant was and is a manufacturing establishment and used the water for steam and condensing purposes does not show and has no tendency to show that the lease should be construed so as to give it the right to turn in and store water that had been used for steam and condensing purposes. Neither does the fact that the pond was originally established to furnish water for manufacturing purposes and that the cutting and taking of ice was an incidental matter show that

the lease should be so construed. The question is one of construction. With these facts before them and all that might be properly inferred as to their knowledge respecting what was done in steam plants operated as that of the Washburn and Moen Company was, and what was or might be reasonable and necessary for the operation and economical running of that plant in the way of turning back water when the supply was short, the parties have seen fit to use language whose only reasonable construction is that it applies to water in its natural condition and does not include the right to turn in and store water that has been used for steam and condensing purposes. The question is not what is necessary and proper for the economical running of a steam plant where water is used for condensing purposes, or what, under certain circumstances, it may be necessary and proper to do in the way of returning water to the pond or the source of supply to keep the plant in operation, but whether the language which the parties have used in the lease can or should be so construed as to include the right to turn hot water into and store it in the pond, and for reasons which we have given we are of opinion that it cannot and should not be so construed. With the consequences of what we think is the true construction we have, of course, nothing to do. The Washburn and Moen Company should have provided for them in the lease if it anticipated them, and if it did not anticipate them it is not for the court to supply the omission. However great his necessity one riparian owner would have no right to foul the water of a stream, or turn in hot water to the injury of another riparian owner (*Merrifield v. Lombard*, 13 Allen, 16; *Mason v. Hill*, 5 B. & Ad. 1), and we cannot think that, under a lease of a pond and the land under it for flowage purposes only, with the exclusive right in the lessee to flow, store and use the water held back by the dam, the lessee would have any greater right to interfere with the natural condition of the water as against one having the right to cut and take ice from the pond. If the rule that doubtful words are to be taken most strongly against the grantor, has any application to a case like this, which we do not concede, since the instrument is an indenture, and the case is not one between the parties to it, nevertheless the words are to be interpreted according to their natural meaning and effect as applied

to the subject matter (*Simonds v. Wellington*, 10 Cush. 813), and so interpreted in the case before us the lease does not, it seems to us, include the right to turn in and store hot water in the pond.

The view which we have taken as to the purpose and effect of the reservation renders it unnecessary to consider further the contention of the defendant that the reservation operated to create an easement in gross in favor of Mr. Salisbury, and that the easement so created is the source of the plaintiff's right, if it has any, to cut and take ice. But we do not see how an easement, in gross or otherwise, can be acquired by the owner of the fee in his own land. An easement in gross is a purely personal right in land belonging to another.

It follows from what we have said that the defendant's first and second requests, that on the pleadings and the evidence the plaintiff was not entitled to recover, were rightly refused. So also we think were the other requests. What we have said disposes of them all, except the twelfth, without considering them seriatim. They were all, except the twelfth, based, in one form or another, upon the contentions that the defendant had an exclusive right in and to the waters of the pond, or that the plaintiff's right, if it had any, was subordinate to that of the defendant, and that the defendant had the right to use the pond and the waters thereof in such manner as was reasonably necessary for the purpose of carrying on its business, even though the result was to prevent the plaintiff from taking ice, or to destroy ice that had been formed and was ready for harvesting. These contentions are manifestly inconsistent with the construction which we have given to the lease and with the views which we have expressed as to the rights of the parties. The twelfth request was properly refused. It assumed that the suspension, if there was one, was temporary and was in the nature of the suspension of a right which the defendant had to turn in hot water. To have given it would manifestly have been misleading.

We see no error in the instructions that were given. The plaintiff could fairly be said to be an assign within the meaning of the reservation, as the judge instructed the jury (*Mitcalfe v. Westaway*, 17 C. B. (N. S.) 658), though, as we have already said, the reservation was in the nature of an exception of the right to cut and take ice which remained in the possession of Mr.

Salisbury and his tenants, rather than an implied grant of an easement of the right to cut and take ice.

There remain the questions of evidence, which we proceed to take up so far as relied upon and argued by the defendant, treating the others as waived.

1. Conversations between the Messrs. Salisbury, father and son, and one White, the treasurer of the plaintiff, and for many years a tenant of the premises and the predecessor of the plaintiff, were admitted against the objections and exceptions of the defendant. We think that they were properly admitted for the purpose of showing that the plaintiff was occupying the premises as tenant at will, and what was included in and the terms and conditions of the tenancy. The plaintiff claimed adversely to the lease to the Washburn and Moen Company, and the objection that the evidence tended to vary the written contract contained in that lease has no force. The plaintiff had a right to show the terms, and conditions, and nature, and extent of its occupancy.

2. The defendant offered to show that the condensing process was reasonably necessary for the proper operation of a steam plant, that for twenty-five years the process of condensing under certain conditions and returning water to the source of supply had been a recognized method of operating steam plants and was reasonably necessary, that there were conditions, where the supply of water was limited, when the return of water to the pond to be cooled and used over again became absolutely necessary to the economical running of the plant and to keep it in operation, and that by reason of the condition of the water in the pond in December, 1899, and January, 1900, it was necessary in order to run the steam plant in its mill to turn back into the pond water which otherwise would have been wasted. This offer of evidence was excluded and we think rightly. It may be doubtful whether the defendant was harmed by the exclusion. It had been allowed to introduce by the cross-examination of one of the plaintiff's witnesses, and by the direct testimony of one of its own, evidence tending to show that condensing was a proper and necessary way to gain most efficiency for the engines, that the method of condensing employed at its mill was a long established system and was necessary for economy in running any steam



plant, and that it was necessary to turn back water into the pond in December, 1899, and January, 1900, to render the condensing system feasible. The testimony that was offered and excluded was the same in substance as that which was thus admitted without objection. We do not see, therefore, as we have already said, how the defendant was harmed by the exclusion. Furthermore, although the testimony was offered for the purpose of affecting the construction of the lease under which the defendant claims, there was no offer to show that Mr. Salisbury was cognizant, at the time when he executed the lease, of what may be termed the state of the art. But, assuming that he was cognizant of the facts that the defendant offered to show in regard to the condensing process and what it was or might be necessary or proper to do in turning back water, the conclusive answer to the contention that the evidence should have been admitted is, as already observed, that with these facts before them the parties saw fit to use language the reasonable construction of which not only does not include the right to turn back hot water into the pond, but excludes it.

8. Still further, the defendant offered to show, as bearing on the construction of the lease, that warm water had been discharged into the pond in years past by the Washburn and Moen Company when the plaintiff's predecessors were cutting ice. The evidence was excluded. It would seem that in this instance also the defendant was not harmed by the exclusion, since evidence to the same effect had been previously introduced by it without objection on the cross-examination of one of the plaintiff's witnesses. But in regard to this evidence, as well as that just considered, the defendant contends that it was admissible to aid in interpreting the phrase "as at present exercised by B. Walker & Company," used in the reservation in the lease of 1890, and the phrase, "as heretofore," similarly used in the reservation in the prior lease to the Washburn and Moen Company, and the phrase "as is done at this time" in the lease of 1878 to Benjamin Walker. But there is nothing to show that those phrases had any reference to the condition of things offered to be shown, or any relation thereto in any way. The obvious purpose and effect of the language referred to, when considered in connection with the rest of the provisions in which they are

found, was to secure to Mr. Salisbury and his tenants the full and unrestricted right to cut and take ice. Furthermore, the uncontradicted testimony showed, that when requested to do so by the plaintiff or its predecessors, in order to enable them to gather the ice, the Washburn and Moen Company stopped turning in hot water till the ice had been gathered, and they had been notified thereof, — which was a recognition of the plaintiff's right rather than an assertion of their own. And lastly, so far as the evidence was offered to show a course of conduct for the purpose of affecting the construction of the lease, it related not to the conduct of the parties to the lease or their privies, but to the conduct of the plaintiff and the defendant of which the lessor if that is material was not shown to have had knowledge, and there was nothing to show that the defendant turned in the hot water under a claim of right to do so under the lease and that this claim was acquiesced in by the lessor. The evidence was therefore inadmissible to affect the construction of the lease or the rights of the parties.

4. The defendant offered in evidence the prior lease from Mr. Salisbury to the Washburn and Moen Company, and it was excluded subject to its exception. We do not see how the defendant was harmed by its exclusion. If it had been admitted, it could not, for reasons already given, have possibly affected the result.

The remaining exceptions to the admission and exclusion of evidence have not been argued and we treat them as waived.

For these reasons a majority of the court think that the exceptions should be overruled.

*So ordered.*

LORING, J. I am unable to concur in the opinion in this case.

This is an action by a corporation, claiming to be "lessee at will" of the exclusive privilege of cutting ice on Salisbury Pond, to recover damages for injury to a sheet of ice (which had formed on the pond and which the plaintiff had prepared for cutting and was about to cut) caused by hot water turned into the pond by the defendant on January 8 and 9, 1900.

Salisbury Pond is an artificial body of water which was made by damming up the waters of several brooks about the year 1840. The land under the pond and the water rights in the

pond were owned by Stephen Salisbury the elder until he died, in 1884, and then passed to his son, Stephen Salisbury the younger, who has since then been the owner of them.

It appeared, on the one hand, that by a lease dated in January, 1890, Stephen Salisbury the younger demised to the Washburn and Moen Manufacturing Company, among other things, "that tract of land lying on the westerly side of said Grove Street as shown on a plan recorded herewith containing as per plan one million ninety-three thousand seven hundred (1,093,700) square feet, comprising the area known as Salisbury Pond, to be used for flowage purposes only, . . . with the exclusive right to flow, store and use water in said pond by means of its dam and flash boards, at a height" stated. The term created by this lease began July 1, 1888, and ended July 30, 1913; and it was admitted that the rights of the Washburn and Moen Company under it had passed to the defendant. The Washburn and Moen Company had been in possession for twenty years prior to July 1, 1888, under a lease made in 1868 by Stephen Salisbury, Sr., and had a somewhat similar right to use the waters of Salisbury Pond. This earlier lease was offered in evidence by the defendant and excluded.

On the other hand, it appeared that it had been the practice to cut ice on Salisbury Pond from early times, the date when this practice began not being given. Stephen Salisbury, Jr., testified that "father used to cut ice himself, before Walker Sweetser cut it there." Then ice was cut by Walker and Sweetser, then by Benjamin Walker. And it appeared from other testimony that Benjamin Walker was cutting ice there as early as 1870. Then the ice was cut by Benjamin Walker and Company and then by a partnership known as the Walker Ice Company, and finally by the plaintiff corporation, which was organized in 1899. In 1878, Stephen Salisbury the elder, by an indenture of lease, demised to Benjamin Walker a tract of land bordering on the pond, "the premises to be used for a dwelling house and other buildings for the ice business," and also "the right to cut and take ice from Salisbury's Pond as is done at this time during the term of this lease." This lease expired in 1883, and was extended until 1886, and finally expired at that time. Since then the successors in the business of Benjamin Walker have repeat-

edly tried to get a written lease from the owner of the pond, Stephen Salisbury the younger, but without success. He has, however, agreed with them by word of mouth that they might hold on the terms of the lease of 1878. There is no pretence that the lease of 1878 has been assigned by Benjamin Walker to his successors in business, or that it has been kept alive by extensions. The practice of cutting ice on the pond has been carried on continuously down to the day when the ice was destroyed by the hot water turned into the pond in January, 1900.

There was evidence that the hot water complained of came from the condensers of the defendant's engines, and was turned into the pond in December, 1899, and from then until February 8, 1900, and that this was done in place of its being turned into the sewers, as had been done immediately before, because the waters of the pond were very low at that time.

The defendant offered to show that "during the past twenty-five years the process of condensing under certain conditions and returning water to the source of supply has been a recognized method of operating steam plants and is reasonably necessary." Before this evidence was offered, the plaintiff's witness, Stephen Salisbury the younger, had testified that "Salisbury Pond is an artificial pond constructed for manufacturing purposes," and that "the plant of the Washburn & Moen Company has been a steam power plant and the water has been largely used to generate steam," and that at that time, i. e. about 1870, "Washburn & Moen, or their predecessors, used the waters for manufacturing purposes, and the pond has been so used from 1840."

As I have already said, the Washburn and Moen Company were in possession of the same premises under a lease from Stephen Salisbury, Sr., for twenty years prior to the date when the lease in question, dated January, 1890, went into effect, and that that lease was offered in evidence and excluded. Had that lease been admitted in evidence, it would have appeared in connection with this testimony of Stephen Salisbury the younger that for a period of thirty-two years before the time of the grievances here complained of the Washburn and Moen Company and its successor and assignee, the defendant corporation, had been in the possession of a steam plant, with a right to use the waters of this pond for generating steam to run its plant.

In my opinion, under the facts in evidence, the lease dated January, 1890, must be construed in the same way as if it had been stated therein that the waters of Salisbury Pond could be used by the lessee to generate steam in running its steam plant situated on the borders thereof; and on this point I do not understand there is any difference of opinion between my brethren and myself.

It is plain to me that in determining whether as matter of construction the right to turn back water from its condensing engines is given by a lease of water to be used in generating steam to operate a manufacturing plant run by steam, the court cannot refuse to consider evidence that "during the past twenty-five years [including twelve and one half years under the lease and twelve and one half years prior thereto] the process of condensing under certain conditions and returning water to the source of supply has been a recognized method of operating steam plants and is reasonably necessary." It is so plain to my mind, that nothing can be added to the statement of it.

The defendant also offered to show by one Allen what had taken place in the past in the matter of discharging warm water into Salisbury Pond from the condensers of the steam plant which is now owned by the defendant and was then owned by the Washburn and Moen Manufacturing Company. Allen testified that he had been in business in Worcester since 1870; that he had lived near the pond all his life and was familiar with it, and that he had seen the discharge of warm water from the condensing engine into the waters of the pond in years past. He then was asked to state what he had observed in that regard. This was objected to, and on being asked how the question was relevant the defendant's counsel stated "If it is a fact that at an earlier time the predecessors of this plaintiff were cutting ice in that pond and when their rights as I assume must be referred to some extent to the conditions formerly obtained,—if at that time it appears that this condensing process of the discharge of warm water direct into that pond existed, I claim it to be material and important on one fact as determining the measure of the assumed right of the plaintiff."

It had appeared in evidence before this offer of proof was made that for thirty years prior to 1900, that is to say, from

1870 to 1900, there had been a pipe which took hot water from the condensers of the defendant's engines and carried it into Salisbury Pond; that this pipe was disconnected in 1890, after being in operation for twenty years, from 1870 to 1890, and remained disconnected for the next nine years, until the winter of 1899-1900 (that is, until the time of the grievances here complained of), when this old pipe was reconnected and another pipe, and afterwards a trough, were put in, which also took the water from the condensers into the pond.

The first ground on which evidence is admissible of what took place in the matter of the discharge of warm water from this old pipe from 1870 to 1890 is the fact that, by the terms of the agreement between Stephen Salisbury, Jr., and the plaintiff, that was the measure of the right to cut ice which Stephen Salisbury, Jr., gave to the plaintiff. By the terms of the oral agreement between the plaintiff corporation and Stephen Salisbury the younger, the right which he gave to it to cut ice was the right given in the written lease between Stephen Salisbury, Sr., and Benjamin Walker, in 1878, and the right given to Benjamin Walker by that lease was "to cut and take ice from Salisbury's Pond as is done at this time." It further appeared that the rights given by Stephen Salisbury the younger by word of mouth to the plaintiff's predecessors in business was also that given in the lease to B. Walker. The lease to B. Walker was in existence from 1878 to 1886; the period during which the old pipe was in operation was from 1870 to 1890. That is to say, the old pipe was in operation eight years before the written lease to Benjamin Walker during the time in which that lease was in operation and for fourteen years after it expired, during which the right given by word of mouth was the right to cut ice as was done when the lease to B. Walker was executed. I am unable to understand why the defendant was not at liberty to show what was done in the matter of discharging warm water into the pond during these thirty years, which include the whole term of the lease to Benjamin Walker, eight years before it began, and fourteen years after its expiration, when the measure of the right which Stephen Salisbury gave to the plaintiff was the right given to Benjamin Walker by the written lease, and the right given to Benjamin Walker was "the right to cut and take ice from Salisbury's Pond as is done at this time."

Not only is this evidence admissible on the ground that it is all Mr. Salisbury undertook to give to the plaintiff, but it is also admissible, in my opinion, on the ground that it is all Mr. Salisbury had to give. All the right to cut ice which Mr. Salisbury had after the lease dated January, 1890, was the right reserved to him under the reservation in that deed, and the terms of that reservation were "to cut, harvest, sell or store for sale, ice from said Salisbury Pond, as at present exercised."

The old pipe was not disconnected until 1890; this lease, though dated January, 1890, went into operation July 1, 1888. I think it was competent to prove what was done during the first year and a half of this lease and for the years immediately before it began, in the matter of discharging warm water into the pond, because by the terms of the lease the right reserved to Mr. Salisbury was to cut ice "as at present exercised."

Moreover I think it was competent to prove what was done by the parties in the matter of discharging warm water into the pond prior to the lease and for the first one and one half years of the lease as the contemporaneous acts of the parties giving a construction to the lease.

In this connection, the defendant offered to show "that by reason of the state of the water and the supply in Salisbury Pond in December, 1899, and January, 1900, it was necessary to turn back water, which otherwise might have been wasted, into Salisbury Pond in order to run the steam plant in the mill." It had previously appeared in evidence that the water in Salisbury Pond at that time was lower than it ever had been within the memory of man and that seven million five hundred thousand gallons were taken out of the pond daily by the defendant in generating steam, and two million nine hundred and fifty thousand gallons of hot water put back; that this continued until February 3, 1900, when, owing to heavy rains which occurred at the end of January, "the water in the pond was high enough then to run the plant without turning it [the hot water] back" into the pond, in the words of one of the plaintiff's own witnesses. This offer of evidence was made to complete the defendant's offer of proof. If the defendant had a right to use the waters of the pond to generate steam, and if returning hot water from the condensers is a recognized method of operating steam

plants, it was incumbent upon the defendant to show that in the case at bar it was necessary for it, under the circumstances existing, to return the hot water into the pond in order to keep its steam plant in operation.

Neither can I concur in the disposition made in the opinion of the contention that by the true construction of the lease dated January, 1890, apart from the evidence I have already dealt with, the defendant had no right to turn hot water from the condensers into the pond. It is stated as a reason for this conclusion that the right to cut ice reserved to Mr. Salisbury in that lease operated by way of exception, under the doctrine peculiar to Massachusetts, acted upon in *Hamlin v. New York & New England Railroad*, 160 Mass. 459, and under consideration in *Simpson v. Boston & Maine Railroad*, 176 Mass. 359. But in determining whether the right retained by a grantor is superior to the grant or subordinate to it, it makes no difference whether the deed by which an easement is retained in the grantor operates by way of exception or by way of a grant back from the grantee, which is usually spoken of as a reservation. The correlative rights of an abutter on a railroad and of the railroad company in a private way over the railroad location are precisely the same, whether the deed retaining in the abutter a right to use the private way operates by way of exception or by way of reservation. The general rule of construction is equally applicable in both cases, that a deed shall be construed against the grantor, *Ashley v. Pease*, 18 Pick. 268, 275; *Palmer v. Evangelical Baptist Benevolent & Missionary Society*, 166 Mass. 143; and that what is retained by the grantor shall be construed so as not to be repugnant to the grant. *Pyncheon v. Stearns*, 11 Met. 304, 312. *Dexter v. Manley*, 4 Cush. 14, 25. *Corbin v. Healy*, 20 Pick. 514.

The plaintiff's own witness, Stephen Salisbury, Jr., testified without objection that "cutting ice [was] always an incident to the use of the water for manufacturing purposes." The conclusion reached by the court is directly in the teeth of this evidence, which was admitted by both parties without objection and thereby became evidence in the case, although had it not been for that it would have been incompetent. *Damon v. Carrol*, 163 Mass. 404. *Boyle v. Columbian Fire Proofing Co.* 182 Mass. 93, 99.



Whether in this case there was a right to turn hot water into the pond is a question which, in the absence of the evidence offered, is not ripe for decision.

But in my opinion there is a fatal objection to the maintenance of this action by the plaintiff in any event, and that objection is that the plaintiff had no right to cut ice, but was a mere licensee.

I understand that in the case at bar it is conceded that the plaintiff corporation did not become tenant at will of the land under the pond, but that the land under the pond during the term of the lease to the Washburn and Moen Company, dated January, 1890, was either the land of Mr. Salisbury or the land of the defendant, who had succeeded to the estate of the lessee under that lease. I also understand it to be conceded that no right of property in the cutting of ice in water flowing this land which at the time was, as I have said, the land either of Mr. Salisbury or of the defendant, vested in the plaintiff corporation by virtue of the parol agreement between it and Mr. Salisbury *proprio vigore*, and that this is so because the right to cut ice under these circumstances is an incorporeal right in the land of some one other than the plaintiff, and this agreement was not under seal. And I further understand that the plaintiff's right to cut ice is made out on the ground that that right had become appurtenant to the land (of which the plaintiff became tenant at will under an oral agreement) and passed to the plaintiff as appurtenant to that parcel of land. I understand further that the way in which it is made out that this right to cut ice had become appurtenant to this parcel of land, of which the plaintiff was a tenant at will, was because it was made appurtenant to it in the lease of 1878, which finally expired in 1886, and because since then the practice of cutting ice on the pond in connection with the parcel of land of which the plaintiff was the tenant at will has *de facto* continued without a break.

The right to cut ice created by the lease to B. Walker dated October, 1878, terminated on the final expiration of that lease in 1886, and the proposition is this: If A. owns an ice house and the land under it, and also a pond, and for a great number of years ice has been in fact cut on the pond to fill the ice house, and A. lets the ice house and the land under it by word of mouth,

a right to cut ice on land which under the lease continues to be the land of the lessor passes to the tenant at will as appurtenant to the land. From that proposition, I must dissent. The right to cut ice is not appurtenant to the land on which the ice house stands, in the case put above and in the case at bar, because during all the years in question both have been owned by the same person and occupied by him or by his tenants. What is meant by a right passing as appurtenant to a parcel of land which is demised is that an incorporeal easement or right in the land of a third person has been granted to the owner of the land demised as appurtenant to that land, and that this right in land of a third person passes to the tenant as appurtenant to the land demised; but where both the parcel of land demised and the parcel of land subject to the right in question — that is to say, both the dominant and servient estates — are owned by the same person, there can be no right in the one parcel appurtenant to the other parcel, however they have been used in fact and no matter how long that use may have continued. In other words, the continued use of what would be an incorporeal right, were the two parcels owned by different persons, however long continued, does not bring into being a right over one parcel appurtenant to the other parcel. It has been held in England since the time of Elizabeth to the present day that where the dominant and servient tenements have come into the ownership of one person an old servitude to which one of those tenements previously has been subject and which is then appurtenant to the other tenement is extinguished by the unity of ownership and is not continued by a *de facto* continuance of the old use, and consequently that it does not pass by a conveyance of what was formerly the dominant estate with appurtenances thereto belonging. *Saundey v. Oliff*, Moore, 467. *Grymes v. Peacock*, Buls. 17. *Whalley v. Thompson*, 1 B. & P. 371. *Clements v. Lambert*, 1 Taunt. 205. *Barlow v. Rhodes*, 1 Cr. & M. 439. *Plant v. James*, 5 B. & Ad. 791.

If a *de facto* use in one parcel of land in connection with another parcel of land, when both are owned by the same person, makes the use of the first parcel appurtenant to the second parcel, the right in question in each of the above cases would have passed under the conveyances with “appurtenances.” Take for

example the case of *Plant v. James*. There a way from the highway had in fact always been used to and from a parcel of land called Park Hall over a parcel of land called Woodseaves. Park Hall was owned by two persons in common and Woodseaves, the land over which this way was laid, also was owned by the same tenants in common. A partition was made by deed, Park Hall was conveyed to the defendant with appurtenances, and Woodseaves was conveyed to the other tenant; it was held that no right of way over Woodseaves passed to the grantee of Park Hall. To pass a right which is *de facto* in use but which does not exist *de jure*, the grant must contain words which will revive or recreate an easement of the same kind as that which formerly existed and had been extinguished by the unity of ownership, and words equivalent to these are sufficient for that purpose: "together with all rights commonly used or enjoyed with the granted premises." See *Bayley v. Great Western Railway*, 26 Ch. D. 434, and cases there cited.

It follows that in the case at bar, there being nothing more than a parol agreement, the plaintiff had no right to cut ice; it was nothing more than a licensee.

It also is plain that a licensee, even while his license is unrevoked, has no right of action if the property upon which he has a license is injured or destroyed by a stranger.

A license gives no right to the property in respect of which the license is given; it goes no further than to excuse what would otherwise be a trespass. So long ago as 1673 it was laid down by Chief Justice Vaughan in the Exchequer Chamber that "a dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful." *Thomas v. Sorrell*, Vaughan, 330, 351. And this has been cited with approval in England in *Muskett v. Hill*, 5 Bing. N. C. 694, 707, and in *Heap v. Hartley*, 42 Ch. D. 461, 468. The same has been laid down in this Commonwealth in *Clapp v. Boston*, 133 Mass. 367. In that case, the petitioner had placed an hydraulic ram in a well dug by him on land of one Lewis, by Lewis' license. The respondent in taking a water supply under St. 1872, c. 177, took some of the petitioner's land and "lawfully flowed the land of Lewis where the ram and well were, so that the ram would not

work, and the petitioner was thereby deprived of the use of the water at his house and barn." It was held that the petitioner could have no compensation for this loss, not on the ground that his license was revocable and had been revoked by the respondent, but on the ground that the license from Lewis "gave the petitioner no estate or right in the land. It was a permission by the owner, which excused acts done under it which without it would be unlawful." Where A. owns a parcel of land covered with water and gives B. a license to cut ice on the water, the land and the ice forming on the water continue to be A's, and if any injury is done to either it is an injury suffered by A. on his property and he alone can sue for it. All that B. has is a dispensation which excuses him from being a trespasser if he cuts ice on A's land. He has no right of property in the ice and therefore has no standing in court to complain that it is injured. The cases of *Balcom v. McQuesten*, 65 N. H. 81, and *Ottawa Gas-Light & Coke Co. v. Thompson*, 39 Ill. 598, are direct authorities to the effect that a licensee, even while his license is unrevoked, has no right of action for injury to the property in question; and to the same effect see *Holford v. Bailey*, 13 Q. B. 426, 446; *Clark v. Close*, 43 Iowa, 92.

It may seem hard that the plaintiff who has secured a right to cut ice so far as an oral contract founded on a valuable consideration could give it, and who has gone to the expense of preparing to cut the ice, should have no remedy for the destruction of the ice by the defendant turning hot water into the pond which, for the purposes of this discussion, I assume it had no right to do. But the hardship is of the plaintiff's own making. It is a rule of the common law that no incorporeal right in the land of another can be acquired without a grant under seal. In the case at bar the plaintiff has been at expense without securing a grant under seal. It is no more a hardship to apply the elementary rule of law that a grant under seal is necessary to pass an incorporeal right than it would be to hold that a grantee under a conveyance of land made by word of mouth and without more gets no title, although he has paid for the land. The real question of hardship is this: Is it wise to require a seal to make a valid grant of an incorporeal right in land which remains the grantor's? I myself think that it would be unwise to allow

a valid grant of such a right to be made by word of mouth. Whether wise or not, the requirement of a seal is the rule of the common law, and until altered by the Legislature must be enforced by the courts.

My view of this case is this : The land under Salisbury Pond became the land of the lessee by virtue of the lease dated January, 1890, during the term thereby created, although the lessee was restricted in the use it could make of the water flowing over the land and of the land itself. The lessor, during the term of this lease, had an easement in gross in the land under the pond (which during the continuance of the lease was the land of the defendant) to cut ice on the pond, and this easement did not pass to the plaintiff because the agreement between the plaintiff and Mr. Salisbury was by word of mouth, and an easement can no more be transferred than it can be created, even for a term of years, except by a grant under seal. *Duke of Somerset v. Fogwell*, 5 B. & C. 875. *Mayfield v. Robinson*, 7 Q. B. 486, see pp. 489 and 490. *Wood v. Leadbitter*, 13 M. & W. 838, 842, 843. See also *Bird v. Great Eastern Railway*, 19 C. B. (N. S.) 268, 286; *Bird v. Higginson*, 2 A. & E. 696; *Roffey v. Henderson*, 17 Q. B. 574; Taylor, Ev. (9th ed.) §§ 973, 974; Hall, Profits à Prendre, 36-38; Goddard, Easements, 359. A valid contract, even one based on a valid consideration, does not convey a right of property in an easement; all that it does is to give a right of action against the other party to the contract in case he fails to perform his obligation under the contract, as was laid down in *McCrea v. Marsh*, 12 Gray, 211, 213, and was subsequently held in *Kerrison v. Smith*, [1897] 2 Q. B. 445. Therefore, it is of no consequence whether this contract is or is not within the statute of frauds, as to which see *Cole v. Hadley*, 162 Mass. 579; *McManus v. Cooke*, 35 Ch. D. 681; *Webber v. Lee*, 9 Q. B. D. 315; *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475; *Ferrell v. Terrell*, 1 Baxt. (Tenn.) 329. Whatever may be the rights of the plaintiff against Mr. Salisbury in contract, the ice was Mr. Salisbury's ice, and for an injury to it no one but the owner, Mr. Salisbury, can sue.

For these reasons, I think that the exceptions should be sustained. Mr. Justice HAMMOND and Mr. Justice BRALEY authorize me to state that they concur in this dissent.

PETER MARTIN vs. MERCHANTS AND MINERS TRANSPORTATION COMPANY.

Suffolk. November 11, 12, 1903. — May 17, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

*Negligence, Employer's liability.*

In an action against a transportation company by an employee, for injuries received while at work in the early morning in the hold of a steamer of the defendant, as the head of a gang of three men under one of the hatchways engaged in attaching bales of cargo by means of a rope sling to sister hooks at the end of the fall of a stationary crane by which they were hoisted from the hold, it appeared, that in hoisting the bales the sling was attached by a double back hitch to one of the sister hooks and that both hooks could not be used at once, that about two hours before the accident one of the sister hooks caught in the coaming of the hatchway and was somewhat straightened, and expert witnesses testified that after the hook was straightened it was not safe to make a hitch on it, that one of the employees called out to the defendant's superintendent in charge "Take the hook off or some one will get hurt" and the superintendent replied "Go on with your work and never mind", that it was the duty of the plaintiff while a load was ascending to pick up from under it the sling from the previous load thrown down from the deck, that the plaintiff, as he testified, had been using the hooks continuously all that night whichever came handiest without noticing that there was anything wrong with them, that there was not much light in the hold of the steamer that night, and that at about four A. M. while the plaintiff was leaning over to pick up the sling for the next load, the hitch slipped on the hook and the ascending load fell on the plaintiff, causing the injuries. *Held*, that there was evidence of the plaintiff's due care and of negligence of the defendant's superintendent, and that the risk was not an obvious one assumed by the plaintiff.

In an action for injuries caused by a bale of cargo while being hoisted from the hold of a vessel falling on the plaintiff from the slipping of a good double back hitch of rope on a hook shown to have been somewhat straightened, where an expert has testified that it is not safe to make a hitch on a straightened hook, the fact, that hitches on this hook bound and held forty or fifty times in hoisting bales before the accident, does not preclude a finding that the straightened hook was the sole cause of the injuries.

TORT, under the employers' liability act, with a count at common law, as stated in the first paragraph of the opinion, for injuries from a bale of rags falling on the plaintiff while he was working in the hold of the steamer Gloucester unloading freight at four A. M. on July 14, 1898. Writ dated December 10, 1898.

At the trial in the Superior Court before *Sherman, J.*, it appeared, that the plaintiff for two years before the accident had been employed in the hold of the Gloucester and in other steamers of the defendant, and that for one year his duty had been hooking on bales for hoisting, using the same apparatus as that used at the time of the accident with sister hooks held together by an iron ring at the top. In making a double back hitch as described in the opinion only one of the sister hooks could be used, and the man who did the hooking on could use either. The hooks, a defect in one of which was alleged to have caused the accident, were in evidence at the trial and were exhibited to the court at the argument. The evidence of the accident is described in the opinion.

At the close of the evidence the defendant requested the judge to rule that on all the evidence the plaintiff was not entitled to recover and to order a verdict for the defendant. The judge refused to rule as requested, and submitted the case to the jury, with four special questions stated in the fifth paragraph of the opinion.

The jury returned a verdict for the plaintiff in the sum of \$4,000; and the defendant alleged exceptions.

The case was argued at the bar in November, 1903, before *Knowlton, Morton, Lathrop, Barker, & Braley, JJ.*, and afterwards was submitted on briefs to all the justices.

*G. C. Dickson & F. Peabody, Jr.*, (*A. N. Williams* with them,) for the defendant.

*J. E. Cotter*, (*T. F. McAnarney* with him,) for the plaintiff.

LOBING, J. This is an action by an employee under the employers' liability act for negligence of a person acting as superintendent for the defendant. There was a count at common law, but a verdict for the defendant was directed on that count, and the case is here on an exception to the ruling allowing the jury to find for the plaintiff on the count under the statute.

The plaintiff with other employees was engaged in unloading the defendant's steamer Gloucester. The Gloucester arrived at her wharf at twelve thirty P. M., July 13. The work of unloading began without delay, and was continued without interruption. The accident to the plaintiff happened about four A. M. The

plaintiff was at work at hatchway No. 1. The cargo at this and the other hatchways was unloaded by means of a stationary crane and fall. At the end of the fall were a pair of sister hooks. A load was made up in the hold of the steamer, to be hoisted out by rolling the piece or pieces of which it was to be constituted on to a rope sling about fourteen feet long, or by passing the sling around them or it. The sling was then brought up or around the load, one end being passed through the bight at the other end of it, and, when the fall came down, was hitched on to one of the sister hooks by a double back hitch. Word was then given to hoist, and the load went up. As the fall came down a sling for the next load was thrown down, and while the bale was going up it was the duty of one of the gang to pick up the second sling.

About two hours before the accident to the plaintiff, one of the sister hooks in use at this hatchway caught in the coaming of the hatchway as the load went up, and was thereby somewhat straightened. The double back hitch should be made above the shoulder made by the curved shape of the hook. There was testimony by witnesses found to be experts that when the hook in question was straightened it was not safe to make a hitch on it. For lack of a shoulder on the hook the hitch might slip. When the hook in question was straightened, one of the employees called out to Wilson, who it is admitted "was a superintendent within the meaning of" the employers' liability act, to "take the hook off or some one will get hurt"; but Wilson replied "Go on with your work and never mind." This is the negligence of the superintendent relied on by the plaintiff.

Two gangs of three men each worked at each hatchway, one on the inshore and the other on the offshore side of the hold. As a load went up, it was the duty of the head of the gang who made up that load to pick up the sling for the next load. The plaintiff was the head of the inshore gang at the hatchway in question, and it was his duty to pick up the sling. As the preceding load made up by the plaintiff's gang was going up, the plaintiff "reached over" to pick up the sling for the next load; the sling "was on the keelson"; the hitch slipped, and the load fell on the plaintiff, causing the injuries complained of.

Four questions were submitted to the jury, all of which



were answered in the affirmative: "First. Was the plaintiff in the exercise of due care? Second. Was the fact that one of the sister hooks was partially straightened called to the attention of Wilson, the superintendent, before the accident? Third. Did Nelson and Wilson consult over the matter concerning the hook or the danger, and then did they say, 'Go on with the hooks'? Fourth. Was the use of the partially straightened hook the sole cause of the injury to the plaintiff?"

The defendant's first contention is that the jury were not warranted in finding that the plaintiff was in the exercise of due care. Its argument is that "there was no cause for hurry on Martin's part, and he could have picked up the sling when they were hooking on, on the offshore side, when the fall was coming down into the hold, when they were unhooking the bale upon the deck, or when he was getting ready to hook on to his load." But the evidence warranted the jury in looking on these suggestions as academic, and in finding that the plaintiff's duty was to hurry, that the only time he was given to pick up the sling on which the next load was to be rolled was as the previous bale was going up. If not done then, it was not done when it should have been done to insure a prompt unloading. If the ascending load swung over the place where the sling to be picked up fell when thrown down, the jury were warranted in finding that it became the plaintiff's duty to go under the ascending load and pick it up. The case comes within *Carter v. Boston Tow-boat Co.*, *post*, 496, and not within *Kilroy v. Foss*, 161 Mass. 138, for the reasons stated in the opinion in the first of these two cases. In this connection see *Hackett v. Middlesex Manuf. Co.* 101 Mass. 101; *Spicer v. South Boston Iron Co.* 138 Mass. 426; *Graham v. Badger*, 164 Mass. 42; *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485; *Pierce v. Arnold Print Works*, 182 Mass. 260.

The defendant's next contention is that the danger from the straightened hook was an obvious one. It appeared from the evidence that it was the plaintiff's duty to make the hitch for the loads of the inshore gang, and that he had made all the hitches during the night in question except the hitch of the load which fell. The defendant contends that when the plaintiff had been making hitches on this pair of sister hooks for two hours

after the one in question had been straightened, he must have become aware of its condition. It was in evidence that when the fall comes down, the head of the gang making up the load reaches out and catches hold of either hook, and makes the hitch on one of them, and that both hooks cannot be used.

But the plaintiff testified that he "had been using the hooks continuously all that night, whichever came handiest, without noticing that there was anything wrong with them." There was evidence that there was not much light in the hold of the steamer that night. The jury were warranted in believing this testimony.

Neither do we think the defendant's next exception well taken. In our opinion the finding that the straightened condition of the hook was the sole cause of the accident was not guess work, but was warranted by the evidence. The fact that many of the loads made up by the inshore gang during the two hours which elapsed after the hook was straightened must be taken to have been made on the defective hook and yet went up safely, does not show that the condition of the hook was not the cause of the accident. The evidence showed that each gang sent up forty or fifty loads an hour. If this hook was used half the time, it carried up forty or fifty loads after it was straightened. But a hitch to be safe must bind; it is not enough that it may bind. For that reason the fact that hitches on this hook did bind for some forty or fifty times does not preclude a finding that the expert who testified that it was not safe to make a hitch on a straightened hook was right, and that the straightened hook was the sole cause of this injury. Freeman testified that the hitch in question was made by him and was "a good double back hitch."

In the opinion of a majority of the court the entry must be

*Exceptions overruled.*

185	492
194	207

ALBERT L. GORDON *vs.* ALICE G. RICHARDSON.

Suffolk. December 7, 8, 1903. — May 17, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER. & LORING, JJ.

*Equity Jurisdiction. Landlord and Tenant. Equity Pleading and Practice.*

A lessee of real estate, bound to pay taxes, is not entitled to relief in equity from a forfeiture of his lease for non-payment of taxes after the leased premises have been sold by the collector for such non-payment, where he does not show that his breach of condition in allowing the premises to be sold for taxes was due to an accident or mistake on his part.

On an appeal from a decree dismissing a bill in equity, where the evidence is made part of the record but there is no statement of facts found or rulings made, the decree will not be reversed on matters of fact unless clearly erroneous.

In a suit in equity seeking relief from a forfeiture at law it is not open to the plaintiff to contend that there was no forfeiture at law.

Whether a lessee, expelled from the leased premises on the ground of forfeiture, can attack the forfeiture at law and if unsuccessful can seek relief from the forfeiture in equity, or whether he must make his election of remedy in the first instance, *quære*.

BILL IN EQUITY, filed October 28, 1902, by the lessee of certain real estate numbered 31 and 33 on Winter Street in Boston, for relief from an alleged forfeiture of his lease for breach of condition in allowing the premises to be sold for taxes which he had agreed to pay, and also alleging that the defendant's entry for alleged breach of condition was not justified.

The Superior Court made a decree dismissing the bill; and the plaintiff appealed.

*C. R. Darling*, for the plaintiff.

*H. N. Shepard*, for the defendant.

LORING, J. The ground on which a tenant gets relief in equity from the forfeiture of his estate for a failure to pay rent is that in equity the landlord's right of re-entry is given as security for the payment of the rent, and on the rent being paid the very thing is done for which the security was given. Although the payment in that case is made after it is due, on interest being paid compensation is made for the delay in performance, and on compensation being made the plaintiff is entitled to relief. *Peachy v. Duke of Somerset*, 1 Stra. 447. *Hill v. Barclay*, 16 Ves. 402, and 18 Ves. 56. *Reynolds v. Pitt*, 19 Ves. 184.

*Howard v. Fanshawe*, [1895] 2 Ch. 581, 589. The Massachusetts cases are *Atkins v. Chilson*, 11 Met. 112; *Sanborn v. Woodman*, 5 Cush. 36. See also in this connection *Stone v. Ellis*, 9 Cush. 95; *Hancock v. Carlton*, 6 Gray, 39, explained in *Mactier v. Osborn*, 146 Mass. 399, 402.

But that does not cover the case before us. In this case the defendant entered for breach of the covenant to pay taxes as well as for breach of the covenant to pay rent. When he exercised his right of re-entry in September, 1902, not only was the tax for 1900 not paid, but the estate of the defendant had been sold because of the plaintiff's failure to pay this tax as he had covenanted to do. The defendant's estate had been sold to pay this tax in the June preceding the September when the defendant entered on the estate. The thing here in question secured by the right of re-entry not only has not been performed, but it cannot be performed now. The tax for 1900 has been paid and no longer can be paid by the plaintiff. The tax was paid to the collector by the application thereto of the proceeds of the tax sale. There is a right to redeem this tax title, but the tax has been paid, and the thing secured by the landlord's right of re-entry can no longer be performed by the tenant. By the very terms of the covenant secured by the forfeiture, any performance of it is at an end, and that is the end of the plaintiff's application for relief from the forfeiture in the case at bar.

Moreover if it were permissible to look behind the terms of the covenant here in question to what might be termed its true nature and substance the plaintiff would gain nothing. If you look beyond its terms, the real substance and nature of a covenant to pay taxes assessed on the demised premises is to protect and hold harmless the landlord's estate. When the breach of the covenant has reached the stage where the landlord's estate has been sold to pay the taxes which the tenant should have paid, and through the default of the tenant a paramount outstanding title has come into existence, we have a breach of covenant for which the plaintiff fails to show that compensation can be made. It is like the breach of a covenant to insure or repair where equity does not ordinarily grant relief against forfeiture of the tenant's estate. *Mactier v. Osborn*, 146 Mass. 399, 402. *Hill v. Barclay*, 16 Ves. 402, and 18 Ves. 56 (overruling Lord

Erskine's opinion in *Sanders v. Pope*, 12 Ves. 282, which never went to a decree, p. 294). *Reynolds v. Pitt*, 19 Ves. 134. *Bracebridge v. Buckley*, 2 Price, 200. *Green v. Bridges*, 4 Sim. 96.

Lord Erskine's opinion in *Sanders v. Pope* was in effect that the forfeiture of a leasehold estate for breach of a collateral covenant stood on the same ground at common law as that on which the forfeiture of a bond stands under St. 8 & 9 Wm. III. c. 11, § 8, which (as Baron Parke said in *Beckham v. Drake*, 2 H. L. Cas. 579, 629) "in effect makes the bond a security only for the damages really sustained."

But that view did not prevail. It is settled that in case of waste, (*Peachy v. Somerset*, 1 Stra. 447,) in case of a breach of a covenant to make repairs, (*Hill v. Barclay*, 16 Ves. 402 and 18 Ves. 56, *Bracebridge v. Buckley*, 2 Price, 200,) and in case of the breach of a covenant to insure, (*Reynolds v. Pitt*, 19 Ves. 134, *Green v. Bridges*, 4 Sim. 96,) it being impossible for the tenant to show affirmatively that compensation can be made, relief ordinarily will not be given. It was this which C. Allen, J. had in mind in *Lundin v. Schoeffel*, 167 Mass. 465, 469, when he said of the case then before the court that it "was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, non-repair, or non-insurance."

The lack of recent cases in England is owing to the fact that relief is given by statute in case of covenants other than the covenant to pay rent. St. 22 & 23 Vict. c. 35, § 4, authorized relief in case of the breach of a covenant to insure, and St. 44 & 45 Vict. c. 41, § 14, in case of all other covenants except the covenant to pay rent, (see clause 8 of § 14,) in which case a bill must be brought within six months from the execution putting the landlord in possession by force of St. 4 Geo. II. c. 28. It is settled that, if a bill is brought within the time allowed for relief against a forfeiture for breach of a covenant to pay rent, the relief is given at common law. *Howard v. Fanshawe*, [1895] 2 Ch. 581, 589. *Stanhope v. Haworth*, 3 Times L. R. 34. As to the purpose of St. 4 Geo. II. c. 28, see Lord Mansfield in *Doe v. Lewis*, Burr. 614, 619, and Wigram, V. C. in *Bowser v. Colby*, 1 Hare, 109, 125.

From what has been said it is apparent that we are not pre-

pared to go so far as the Court of Appeals went in its opinion in *Giles v. Austin*, 62 N. Y. 486, 493. The facts in that case are stated in 6 Jones & Spen. 215, and it appears that the failure to pay the taxes in that case was in fact through accident and mistake, although that was not relied on in the opinion of the court.

There is however jurisdiction to relieve against a forfeiture for breach of collateral covenants, if the breach came through accident or mistake. This was established in this Commonwealth in *Mactier v. Osborn*, 146 Mass. 399, following the suggestion of Lord Eldon in *Hill v. Barclay*, 18 Ves. 56, 62, affirmed in *Bamford v. Creasy*, 3 Giff. 675, 680. *Bargent v. Thomson*, 4 Giff. 473.

If it be assumed in favor of the plaintiff that he could have relief here on proving that it was through an accident or a mistake on his part that the non-payment of the 1900 taxes went to a sale, yet the decree in the case at bar must be affirmed. The case comes here by appeal from a decree dismissing the bill. The evidence is before us, but there is no statement of facts found or of rulings made. The decree, so far as it involves matters of fact, is to stand unless it appears by the evidence to be clearly erroneous. *Brown v. Brown*, 174 Mass. 197. *Dickinson v. Todd*, 172 Mass. 183. *Edwards Hall Co. v. Dresser*, 168 Mass. 136. *Lundin v. Schoeffel*, 167 Mass. 465. See also *Blossom v. Negus*, 182 Mass. 515.

It is enough that the presiding judge who saw the plaintiff on the stand may not have given credit to the excuse which he made, namely, that the sale for the 1900 tax was made earlier than usual.

We have not considered the plaintiff's argument that there was no forfeiture of the lease. We are of opinion that in a bill in equity to be relieved from a forfeiture at law it is not open to him to make the contention that there is no forfeiture at law. Such a case comes within *Pitkin v. Springfield*, 112 Mass. 309, in which it was held that in a petition for compensation for land taken it was not open to contend that the statute providing for the taking was unconstitutional, or that the taking was invalid. See also in this connection *Smith v. Valence*, 1 Rep. Ch. 90. The case of *Boston & Maine Railroad v. Graham*, 179 Mass. 62, stands on its special circumstances. Whether the plaintiff could

have attacked the forfeiture at law and filed this bill in case he was unsuccessful at law, (see *Moore v. Sanford*, 151 Mass. 285,) or must in such a case make his election in the first instance, it is not necessary to consider.

*Decree affirmed.*

185	496
f185	1490
185	496
193	1417

### EDWARD A. CARTER vs. BOSTON TOWBOAT COMPANY.

Suffolk. January 20, 21, 1904. — May 17, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Negligence, Employer's liability. Evidence, Opinion: Experts.*

In an action against a towboat company, by an employee in charge of a wrecking lighter of the defendant having a crew of three men under him, for injuries from the breaking of a pump sling used in moving a wrecking pump from the defendant's wharf to the lighter, causing the pump to fall on the plaintiff who was on deck guiding it with his hands, there was evidence, that the sling had become weakened by rust and was not strong enough for the work, and that this should have been known to the servants of the defendant in charge of the appliances, and it did not appear that there were other slings of sufficient strength within reasonable reach of those servants, that the plaintiff believed that the sling was strong enough to hold the pump and had no reason to believe otherwise, that the plaintiff was reasonably careful in the performance of his duty in trying to turn the pump as it came over toward the lighter, that neither the plaintiff nor any of his crew had anything to do with shackling on the sling, hoisting the pump or lowering it to the deck, their duty being confined to placing it as it was lowered. *Held*, that there was evidence to go to the jury of the plaintiff's due care and of the defendant's negligence.

An analytical and consulting chemist may be allowed to testify as an expert that the upper part of a certain sling rope which he has examined has been wet with salt water and has come in contact with an iron ring which was rusted, and as to the effect which iron rust and salt water produce on a manila rope like the one examined.

TORT, against a towboat company, by an employee in charge of a wrecking lighter of the defendant having a crew of three men under him, for injuries from the breaking of a pump sling used in moving a wrecking pump from the defendant's wharf at East Boston to the lighter, causing the pump to fall on the plaintiff, who was on deck guiding it with his hands. Writ dated April 28, 1902.

In the Superior Court the case was tried before *Fox, J.* The material facts which the jury would have been warranted in finding upon the evidence appear in the opinion.

One George W. Miles, called as a witness by the plaintiff, testified, subject to the defendant's exception, that he was an analytical and consulting chemist and made an examination of the upper part of the sling rope on May 25, 1903. He then was asked to state to the jury what he found there. To this the defendant objected on the ground that it was not competent or relevant to introduce the evidence of any chemist. The plaintiff then was recalled and testified that the rope had been kept in the pantry in his house from a day or two after the accident until a week before this trial.

The witness Miles then was recalled and the judge ruled that he might answer the question objected to, the defendant excepting. The witness testified, that the chemical condition of the rope would be practically the same at the time of his examination as on March 1, 1902, and, subject to an exception by the defendant, testified, "that he found the rope had been wet with salt water, as it contained salt in various portions all through the rope and at its ends which came in contact with the iron ring which was rusted, which was shown up at the top by a chemical analysis; and that iron rust is well known to rot any vegetable fibre and that chemical action will do that." The plaintiff's counsel then picked up a piece of rope, remarking, "I notice this is one piece that has just dropped out from the rope. Now, will you state to the jury what the effect of iron or iron rust and salt water produces upon a manila rope such as that is?" To this the defendant objected and on the judge's ruling that the question was admissible excepted. The witness answered that any salt in the presence of moisture would cause iron to rust much more quickly than it would in fresh water, and that any iron forming oxide in the presence of fibre will rot the fibre.

At the close of the evidence, the defendant requested the judge to rule that upon all the evidence the plaintiff could not recover and to order a verdict for the defendant. The judge refused to rule as requested and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of \$6,500; and the defendant alleged exceptions.



The case was argued at the bar in January, 1904, before *Knowlton, C. J., Lathrop, Barker, Hammond, & Braley, JJ.*, and afterwards was submitted on briefs to all the justices.

*J. Lowell & G. McC. Sargent*, for the defendant.

*J. J. Feely*, for the plaintiff.

HAMMOND, J. The evidence would have warranted the jury in finding that by reason of the action of iron rust and salt water some portion of the fibre of the sling had become weakened, so that the sling was not strong enough to do the work expected of it and was therefore defective; that by the exercise of reasonable care this should have been known to those persons to whom the duty of the defendant as to providing safe and proper appliances had been intrusted; that as to this particular sling the plaintiff was not such a person; that it did not sufficiently appear that within the reasonable reach of the servants there were slings of the requisite strength which might have been used in this job; that the plaintiff believed, and had no reason to believe to the contrary, that the sling was strong enough to hold the pump; that in trying to turn the pump as it came over towards the lighter of which he had charge he was in the performance of a duty; that he was reasonably careful in doing it; and that the accident was due to no negligence on his part, but solely to the breaking of the sling. Upon such findings, the jury might properly come to the conclusion that the plaintiff, while in the exercise of due care, was injured by the failure of the defendant to see that due care was exercised to provide safe and proper appliances for its workmen, and, inasmuch as the risk of a failure to perform this duty was not on the plaintiff, they could properly hold the defendant answerable for the consequences. See *Graham v. Badger*, 164 Mass. 42, 47; *Moynihan v. Hills Co.* 146 Mass. 586; *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485, 486; *Boucher v. Robeson Mills*, 182 Mass. 500, 502.

The case differs materially from *Kilroy v. Foss*, 161 Mass. 138, upon which as to the question of due care of the plaintiff the defendant strongly relies. In that case the plaintiff was caring for the tag rope at the end of a derrick boom used to guide the descending load to its place on the ground, and had room to keep clear of the load as it was lowered on to the ground. The load consisted of stone to be used in erecting a building, and was

being unloaded from a cart by a hand derrick. It is stated in the bill of exceptions that the plaintiff testified that by means of the derrick boom and the tag rope "one would be enabled to guide the stone at a distance and stand away from it while it was suspended from the derrick boom; that he knew these were the purposes for which the tag rope was used."

In the case at bar it was the plaintiff's duty to place the pump on the deck of the lighter as it was hoisted over the side of the wharf and lowered on to the deck by men other than his crew. The jury were warranted in finding that neither the plaintiff nor any of his crew had anything to do with shackling on the sling, hoisting the pump or lowering it on to the deck. Their duty was confined to placing it as it was lowered. One of his crew, George V. Ashland, called as a witness by the defendant, was tending the forward guy on the pump as it was lowered away to the deck, and he was told by the plaintiff not to "slack it too much."

The pump had to be turned so as to be fore and aft with the lighter as it came over the side of the lighter, "in order to lower the pump any more," and the plaintiff was turning it when "the sling broke, and he found himself underneath the pump."

The plaintiff had to put his hands on the pump. He was not tending the tag rope of a derrick boom. The wharf gang had not hitched on a guy by which the plaintiff could turn the pump. He had to take hold of the pump. There is no direct evidence that he was under the pump farther than was necessary.

The pump was coming over the side of the wharf and was being lowered on to the deck. The plaintiff was on the deck. He was necessarily lower than the pump. It does not appear that he got unnecessarily under it. "He found himself underneath it" after it fell. It may be that he was on the after end of the pump, and that Ashland had been keeping the forward guy taut and so had been keeping the pump from swinging forward, and that he slacked up and it swung aft over the plaintiff and fell on him. In the opinion of the majority of the court the questions of the due care of the plaintiff and the negligence of the defendant were properly left to the jury.

No error in law was committed in the admission of the questions put to the expert Miles and of the answers thereto.

*Exceptions overruled.*

185	500
f187	'117
185	500
193	'193

ALFRED A. OLDS & another vs. CITY TRUST, SAFE DEPOSIT  
AND SURETY COMPANY OF PHILADELPHIA.

Hampshire. September 15, 1903. — May 18, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Estoppel. Bond. Surety. Practice, Civil. Corporation. Judgment, Of other  
State. Evidence, Of foreign law, Presumptions.*

A surety on a bond to dissolve an attachment by trustee process, on the giving of which the plaintiff released the alleged trustee who thereupon paid to the defendant a debt in excess of the plaintiff's claim, is estopped when sued on the bond from setting up that the trustee could not have been held on his answer and that therefore there was no valid attachment.

It is no defence at law to an action against a surety on a bond to dissolve an attachment, that the plaintiff has not exhausted other remedies before suing the defendant or has failed to realize on collateral security.

Because an agreed statement of facts states that a certain witness testified that when certain notes matured he was solvent and able to pay them and that he thereafter became insolvent and unable to pay them, it is not a conclusion of law that the witness ever was solvent or that anything could have been recovered on the notes at maturity.

The provision, originally enacted in St. 1819, c. 43, and now found in R. L. c. 109, § 53, that a corporation after dissolution shall exist for three years for the purpose of prosecuting and defending suits and settling its affairs, does not apply to corporations organized in other States.

Whether, after the dissolution of a corporation in another State by the laws of which it was created, a creditor in this Commonwealth has no remedy in equity or otherwise by which he can take advantage of the former corporate existence for the purpose of availing himself of assets here, *quære*.

From a statement in an agreed statement of facts, that a certain court of general jurisdiction in another State made a decree purporting to dissolve a certain corporation organized in that State, it is not a necessary inference that the corporation was dissolved.

In the absence of evidence on the subject there is no presumption that the statutes of another State are like those of this Commonwealth. Thus there is no presumption that the statutes of New York give power to any court in New York to dissolve a corporation.

BARKER, J. The plaintiffs, Olds and Whipple, on November 11, 1896, brought an action of contract in the Superior Court in Hampshire County against the Mapes-Reeve Construction Company, by a writ the *ad damnum* of which was \$10,000 and in which one DeWitt Smith alleged therein to be commorant of Northampton was named as trustee of the defendant with goods,

effects and credits of the defendant in his hands to that amount. The alleged trustee answered that he was not a citizen or resident of Massachusetts, that he had no place of business therein, and that he had no goods, effects or credits of the defendant in his hands except that the construction company had brought an action against him seeking to establish a certain disputed claim and to establish a lien therefor upon certain real estate belonging to him in Northampton, submitting himself to examination and asking to be discharged and for his costs.

The construction company on January 11, 1897, entered a general appearance and filed an answer denying each and every material allegation in the writ and declaration. This being the situation of the case in court at the October sitting in 1898 the construction company filed a motion alleging that there was an attachment of its property on mesne process in the suit, by the summoning therein of the alleged trustee, to the amount of \$10,000, and that the same was excessive, and asking for a reduction of the attachment. At the same sitting, by consent and by order of the court, the attachment was reduced to \$4,500. Thereupon, on or about November 16, 1898, the construction company as principal and the City Trust, Safe Deposit and Surety Company of Philadelphia, the defendant in the present suit, as surety, gave to the plaintiffs a joint and several bond for the sum of \$4,500, reciting the attachment and stating that the construction company desired to dissolve it according to law. The present action is brought to recover from the surety upon this bond. One condition of the bond, among others not now material, is that if the construction company shall within thirty days after the final judgment in the action in which the attachment was made pay to the plaintiffs the amount if any which they shall recover in the action the obligation of the bond shall be void.

Thereafter the action was referred to an auditor and such other proceedings were had therein that on December 3, 1900, judgment for the plaintiffs was entered therein by consent for \$1,354.13 damages and \$94.33 costs, and on this judgment execution issued on December 5, 1900. The construction company refusing to pay the judgment demand was made on the surety company to pay it or to satisfy the execution, and on March 1,

1901, this action was brought against it on the bond of November 16, 1898.

The action was heard upon an agreed statement of facts by the Superior Court sitting without a jury in June, 1903, and after a finding for the plaintiffs in the sum of \$5,157 damages filed on August 10, 1903, the defendant appealed to this court, a judgment for the plaintiffs upon the finding having been entered in the Superior Court as of August 10, 1903.

1. The first contention of the defendant is that the bond was neither a good statutory bond nor a good common law bond and that therefore it is invalid.

In support of this contention it is urged that there was no attachment, because the alleged trustee answered in such a way as to discharge himself. But his answer was not an absolute denial of funds. It in substance admitted that the construction company contended that he owed it a debt for which it was prosecuting a suit against him in which the company sought to establish a lien for its debt upon his land in Northampton. One of the agreed facts is that when the service was made on the alleged trustee he was indebted to the construction company in a sum greater than the amount of the judgment which the plaintiffs recovered against that company, and that he paid the company his debt after the bond now in suit was filed. When the bond was offered it was still open to the plaintiffs to file interrogatories to the alleged trustee upon all matters stated in his answer, and if he had answered truly it would have appeared that when summoned as trustee he was largely indebted to the construction company. It cannot now be assumed that if compelled to answer interrogatories as an alleged trustee he would not have made statements upon which he would have been charged and the debt due from him to the construction company held and applied under the process to the extinguishment of the plaintiffs' demand. In consequence of the filing of the bond the alleged trustee was subjected to no further proceedings in the suit and the plaintiffs were left to rely wholly on the bond. The short answer to the contention that the bond is invalid is that it having been given under such circumstances it is not open to the defendant when sued upon it to contend that there was no attachment. It was intended to induce the plaintiffs to abandon

their attempt to appropriate to the payment of their demand then in suit a debt owing by the alleged trustee to the construction company, and it did have that result, to the legal detriment of the plaintiffs. All the elements of an estoppel are present. See *Stiff v. Ashton*, 155 Mass. 130.

2. The defendant contends that its position as one of the obligors of the bond was merely that of a guarantor of the solvency of the construction company and of one Reeve who when the bond was given was indorser on promissory notes given by that company to the plaintiff as collateral to the demand on which the suit was being prosecuted. But the contract entered into by the defendant was an explicit undertaking to pay the plaintiff \$4,500 unless the construction company should pay a judgment within thirty days after it might be rendered. It would be absurd to hold that the surety on a bond given to dissolve an attachment could require the obligee to exhaust any collateral security which he might hold before taking judgment in the suit in which the bond was given. If, as we do not intimate, such an obligor has any concern with the action of his obligee as to collateral, or as to other remedies which may be open to the obligee as against the defendant whose property is to be freed from the attachment, it can be no more than a right to subrogation on payment of his bond, and in no event can it be more than an equitable defence to a suit upon his bond. The agreed facts show that the notes held as collateral were in existence and maturing when the bond was given, and that they never were renewed. While the agreed facts state that Reeve testified that when the notes matured he was solvent and able to pay them and that he thereafter became insolvent and unable to pay them, it is not a conclusion of law from that statement that he was ever solvent or that any suit against him on the notes would have brought in money to the plaintiffs. It is plain that the judge who heard the case on the agreed facts was not bound in law to find for the defendant because of the collateral notes or the plaintiffs' conduct with reference to them.

3. The remaining contention is that the judgment against the construction company was void because that corporation was dissolved before the judgment was entered. The corporation was one organized under the general laws of the State of New

York. Upon a petition of its directors for a voluntary dissolution an order was entered in the Supreme Court of New York on November 13, 1899, appointing a receiver, and another order making the appointment permanent and purporting to dissolve the corporation was entered on May 4, 1900. The only statement in the agreed facts as to the law of New York is that the court could have provided in its decree purporting to dissolve the corporation for the continuance in its name of suits then pending by and against it, and did not so provide. Neither of these orders was brought to the attention of the Superior Court and no proceedings were taken to enforce them here.

There seems to have been a studied attempt to keep the plaintiffs in this suit and the courts in which this suit was pending in ignorance of the dissolution proceedings. The original suit against the construction company was sent to an auditor who filed his report in favor of the plaintiffs in May, 1899. The New York decree purporting to dissolve the construction company was entered on May 4, 1900. The Massachusetts suit was tried by the court without a jury in June, 1900, and a finding filed in August, 1900. The plaintiffs took exceptions to the full court which were argued in September, 1900, a rescript was sent down October 18, 1900, and judgment was entered by agreement in December, 1900.

The attorney for the surety company in the present action was attorney for the construction company in the original action. One Kimber of New York, attorney, assisted in the defence of the construction company in the original action from beginning to end, and is assisting the surety company, in the same capacity in the present action. This same Kimber presented in November, 1899, the petition in the New York court for the dissolution of the construction company, and it was upon his motion that the dissolution was decreed on May 4, 1900. After this decree and without giving notice of it to the Massachusetts courts, this same Kimber allowed the Massachusetts attorney who had appeared for the defence up to that time to appear for the construction company and to try the case for it before the Superior Court in June, 1900, and then to argue the exceptions for the construction company in September, 1900, and then to agree to a judgment against the construction company in December, 1900.

The plaintiffs contend that the provisions of our statute relating to corporations whose charters have expired or whose corporate existence has been terminated in any other manner, originally enacted in St. 1819, c. 43, and now found in R. L. c. 109, § 53, kept the construction company in existence as a body corporate in Massachusetts for three years from May 4, 1900.

Whether similar statutes should be held to apply to corporations created by any other sovereignty than that by which the statutes are enacted has been more or less discussed and with results which have varied in different jurisdictions. See *Fitts v. National Life Association*, 130 Ala. 413; *Marion Phosphate Co. v. Perry*, 74 Fed. Rep. 425; *Stetson v. City Bank of New Orleans*, 2 Ohio St. 167, and 12 Ohio St. 577; *Life Association of America v. Fassett*, 102 Ill. 315; *Rogers v. Adriatic Ins. Co.* 148 N. Y. 34; *Hammond v. National Life Association*, 69 N. Y. Supp. 585, and 168 N. Y. 262.

We are of the opinion that our own statutes referred to were intended by the Legislature to apply only to our own domestic corporations.

At the same time we are not ready to concede that after the dissolution of a foreign corporation by the sovereignty by which it was created, its creditors in this State cannot in some way by proceedings in equity or otherwise take advantage of the former corporate life through our own courts so far as to avail themselves of assets in this State.

The present case was heard by the lower court upon agreed facts. Since it was agreed that a decree purporting to dissolve the construction company was entered in the Supreme Court of New York on May 4, 1900, the finding for the plaintiffs implies a finding that the decree of dissolution was void. The court which entered it was a court of general jurisdiction; but the dissolution of a corporation is a peculiar function which resides primarily in the Legislature and is conferred upon courts only by explicit legislative authority. *Folger v. Columbian Ins. Co.* 99 Mass. 267. Therefore the decree of dissolution was void unless jurisdiction to enter it had been conferred upon the Supreme Court of New York by some statute law of that State. Therefore it was a question of fact for the lower court in the



present case whether jurisdiction to dissolve the construction company had been given to the New York court by a statute of that State.

The agreed statement of facts does not contain a clause that the court may draw inferences of fact from the facts and evidence stated, and therefore neither the inferior court in the first instance, nor this court upon the appeal had or has the right to found its judgment upon any disputable inference of fact. *Old Colony Railroad v. Wilder*, 137 Mass. 536, 538. *Gallagher v. Hathaway Manuf. Co.* 169 Mass. 578. Unless upon the facts stated "with the inevitable inferences, or, in other words, such inferences as the law draws from them," jurisdiction to dissolve the corporation appeared, neither the inferior court nor this court can infer such jurisdiction, nor find that the construction company was in fact dissolved. It is not an inevitable inference which the law draws conclusively from the entry of a judgment by a court of general jurisdiction that the court which entered it had jurisdiction of the cause, or to give all the relief which by its decree it purported to give. Nor is there any presumption in Massachusetts that the statutes of New York give power to any court of New York to dissolve a corporation. See *Kelley v. Kelley*, 161 Mass. 111, 112. Therefore the precise question is whether it was an inevitable inference from the agreed facts that the New York court had jurisdiction to decree a dissolution of the corporation on May 4, 1900, and then did make a decree not only purporting to dissolve the construction company, but which in law and fact actually then extinguished totally its life.

In our opinion no such inevitable inference is drawn by the law from the facts stated, and therefore neither the lower court nor this court upon the appeal was precluded from finding that the judgment entered against the construction company after the date of the decree purporting to dissolve it was a valid judgment.

*Judgment for the plaintiffs affirmed.*

The case was argued at the bar in September, 1903, before *Knowlton, C. J., Morton, Barker, Hammond, & Loring, JJ.*, and afterwards was submitted on briefs to all the justices.

*W. G. Bassett*, for the defendant.

*E. H. Hyde*, (of Connecticut,) (*J. B. O'Donnell* with him,) for the plaintiffs.

D. O. HAYNES AND COMPANY *vs.* WILLIAM F. NYE.

Bristol. October 27, 1903. — May 18, 1904.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, &amp; LORING, JJ.

*Contract, Damages.*

A dealer in oils made an agreement in writing with the publisher of a newspaper to pay a certain sum of money for the publication of "our advertisement" in the newspaper once a week during a period named. He failed to furnish the advertisement when requested to do so and forbade the publisher to publish a certain old advertisement of the dealer from another newspaper advertising among other things certain articles which the dealer then did not have for sale. The dealer although often requested failed to furnish the new advertisement and the publisher published the old advertisement during the period covered by the contract and sued the dealer in contract, with a count for breach of contract and another count for the contract price of the advertising. *Held*, that the defendant committed a breach of his implied agreement to furnish an advertisement to be inserted in the plaintiff's newspaper and was liable in damages, which should include the profits that the plaintiff might have made under the contract, that the burden was on the plaintiff to prove his damages, and, if he introduced evidence that the damage would be the contract price, the jury would be warranted in assessing damages for that amount but would not be bound to do so, and it would be error to instruct the jury that as matter of law they should assess the damages at the contract price, performance of the contract by the plaintiff having been made impossible by the defendant.

KNOWLTON, C. J. The plaintiff corporation is the proprietor of a newspaper called the New York Commercial, published in the city of New York, and it made a contract in writing with the defendant as follows:

"\$300.00. New Bedford, Oct. 25, 1900. D. O. Haynes and Co., Publishers, New York. Please insert our advertisement in the New York Commercial, to occupy the space of four inches and to be inserted one time a week for twelve months, beginning with issue of Dec. to Jan. 1, 1900 for which I agree to pay you three hundred dollars in monthly payments. Name, William F. Nye. Full address, New Bedford, Mass. Business, Oil Man'fr. Agent. J. E. Sullivan."

The plaintiff, at the time, accepted the order through its agent Sullivan, who forwarded to it the writing, and it entered upon the performance of the contract. The defendant was a dealer in oils, and it was understood that he could change the advertise-

ment or copy at any time, as often as he chose. Sullivan had with him a copy of an advertisement which the defendant previously had published in another newspaper, and he told the defendant that he could send such copy as he desired to have published, and if no copy was received before the time for publication the plaintiff would publish the copy which the agent had with him. The defendant had previously told the agent that he did not wish to have that advertisement published, as he did not then have for sale some of the articles mentioned in it. Before the first publication of the advertisement the defendant notified the plaintiff by letter not to publish the advertisement, and he failed to furnish the plaintiff any copy for publication, although often requested to do so. The plaintiff published this advertisement for nine months, against repeated objections by the defendant. The declaration is in three counts, the first to recover damages for the breach of the contract, the second to recover the contract price for the performance of the contract, and the third upon an account annexed.

The defendant asked the court to rule, "That the plaintiff had no claim against the defendant except by virtue of the contract, and had no right to furnish the copy for advertisement, and its only remedy was for damages for breach of the contract." Also, "That the publication of the copy supplied by it, against the protest of the defendant, was not such a substantial performance of the contract on the part of the plaintiff as would entitle it to recover for such publication." The judge declined to give these instructions, but instructed the jury that if, after the defendant's refusal to furnish an advertisement, the plaintiff did, in good faith, go ahead and do the best it could to carry out the contract, then it is entitled to recover compensation for it. In another part of the charge he said, "The measure of that damage is, at all events, compensation for the advertisement for the number of times that it was inserted in the paper. . . . He is entitled to recover twenty-five dollars for nine months, and he is entitled to recover that, if he is entitled to recover anything, with interest from the date of the writ. . . . The simple question is, whether that contract was made or not; . . . that is the sole and only question." The jury returned a verdict for the amount claimed and interest.

Under the contract the plaintiff was to "insert our advertisement," that is, the defendant's advertisement. The defendant impliedly agreed to prepare an advertisement to be inserted. On the undisputed facts the contract was broken by the defendant before the first publication, and he persistently refused to perform it, and repeatedly forbade the plaintiff's attempts at performance afterwards. He is liable to the plaintiff in damages for the breach, and these damages may include the profits that the plaintiff might have made under the contract. His refusal to furnish an advertisement to be published, or to consent to the publication of the former advertisement, put it out of the power of the plaintiff to perform the contract, and its only ground of recovery is the breach, for which it should be awarded damages. There was evidence that the damage to the plaintiff would be the contract price, and this would have warranted the jury in assessing damages accordingly. But the burden was on the plaintiff to establish its damages, and the jury were not bound to believe this evidence, or to disregard the circumstances from which they might have found that the damage was something less than the contract price. On this part of the case there was error in instructing the jury as matter of law as to the amount of the damages.

It has been suggested in argument that the contract may be interpreted as an agreement to reserve space for an advertisement of the defendant which he might fill in any proper way. If this had been the contract, the plaintiff might have left the space blank, or might have designated it properly as space reserved for the defendant, and have recovered for a performance of the contract; but it would not be performance of such a contract to persist, against the defendant's orders, in printing an advertisement which he did not want, and which represented him as having goods for sale which he did not have.

*Exceptions sustained.*

*J. L. Gillingham*, for the defendant.

*M. R. Hitch*, for the plaintiff.

LEVI HUDSON, administrator, *vs.* LYNN AND BOSTON  
RAILROAD COMPANY.

Essex. November 4, 1903. — May 18, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND  
LORING, & BRALEY, JJ.

*Street Railway. Negligence, Contributory. Words, "Exercise of due diligence."*

185	510
189	295
185	510
192	125
185	510
193	453

To recover from a street railway company, under St. 1886, c. 140, for the loss of life of a person not a passenger or an employee of the company, the plaintiff must show that his testator or intestate was actively and actually in the exercise of due diligence at the time of the injury which caused his death.

A person in such a stupor, from intoxication or otherwise, that shaking and kicking him does not wake him, cannot be found to have been in the exercise of the due diligence required by St. 1886, c. 140, to enable his administrator to recover from a street railway company for causing his death by an injury suffered while in this condition.

TORT, to recover for the loss of life of one Pope, the plaintiff's intestate, from being run over by a car of the defendant, and also for an assault alleged to have been committed upon the plaintiff's intestate in ejecting him from a car of the defendant. Writ dated September 28, 1898.

At the first trial of this case in the Superior Court a verdict was ordered for the defendant at the close of the plaintiff's evidence. The plaintiff alleged exceptions which were sustained by a decision of this court reported in 178 Mass. 64. At the new trial in the Superior Court before *Gaskill, J.*, the plaintiff's evidence was substantially the same as at the first trial, but the defendant introduced evidence which it did not do at the first trial.

The judge left to the jury three questions, each of which the jury answered in the affirmative as follows: 1. "Were the servants of the defendant grossly careless in leaving Pope in the place where he was left when ejected?" A. "Yes." — 2. "Ought the defendant's servants reasonably according to common experience to have anticipated that Pope would stray upon the defendant's track?" A. "Yes." — 3. "Were the servants of the defendant or either of them grossly careless at or

just prior to the time the car came in contact with Pope?"  
A. "Yes."

The jury found for the plaintiff on the fifth count, for assault, and assessed damages in the sum of \$1. The jury also found for the plaintiff on the fourth and sixth counts, for causing the death of the plaintiff's intestate, and assessed damages in the sum of \$5,000.

The judge reported the case for determination by this court.

If, upon all the evidence, this court was of opinion that the judge erred in submitting the case to the jury on the fourth and sixth counts, judgment was to be entered for the defendant. If there was no error in submitting the case to the jury, or in refusing to give the instructions requested by the defendant, or in the charge to the jury, judgment was to be entered on the fourth and sixth counts on the verdict. The requests for instructions and the charge, as well as other terms of the reservation here omitted, have been made immaterial by the decision of the court.

The case was argued at the bar in November, 1903, before *Knowlton, C. J., Morton, Barker, Loring, & Braley, JJ.*, and afterwards was submitted on briefs to all the justices.

*F. D. Allen*, (*W. L. Van Kleeck* with him,) for the plaintiff.

*H. F. Hurlburt*, (*D. E. Hall* with him,) for the defendant.

LORING, J. This is an action brought in 1898, under St. 1886, c. 140, to recover a penalty for wrongfully causing the death of Joseph P. Pope, the plaintiff's intestate.

The jury were warranted in finding that Pope took a car of the defendant at Scollay Square, Boston, for Lynn about eight o'clock in the evening of a day in September. He paid his first fare and then fell into a stupor. When the car reached Revere, a second fare came due. The conductor tried to rouse him to collect the fare, without success, and after collecting the other fares, in the language of one of the plaintiff's witnesses, "he came back to him and shook him and kicked him and couldn't wake him up." Thereupon the conductor and motorman put him off, "one took him by his head and the other the feet" and laid him down beside the tracks on the Lynn marshes. He was run over and killed by the same car on its return trip to Boston. Pope was a soldier in the regular army quartered at Fort War-

ren; the day of the accident was pay day and Pope had been drinking on that afternoon. This was uncontradicted. But there was evidence from persons in the car with him that he did not appear to be intoxicated, and it may perhaps be assumed (if material) that the stupor could have been found not to be the result of drink.

The declaration contained six counts. Verdicts were directed for the defendant on the first three counts. The fifth count was a count for assault and battery; a verdict for the plaintiff in the sum of \$1 was returned on this count. With this the defendant is content. The fourth and sixth counts are stated to be counts under Pub. Sts. c. 112, § 212, but that act, so far as a civil remedy is given, applies to steam railroads only, and the corresponding act, St. 1886, c. 140, is doubtless intended. In the fourth count the plaintiff alleges that his "intestate was then and there a person in the exercise of due diligence and not a passenger," and in the sixth count that he was a passenger.

It is plain that the intestate ceased to be entitled to the rights of a passenger on failing to pay the second fare when due. That ends the plaintiff's right to recover on the sixth count.

It also is plain that there was no evidence of negligence in the operation of the car on its return trip when the plaintiff's intestate was run over and killed; and the plaintiff, to recover, must show the defendant's negligence in putting the intestate off as he was put off, relying on the action of the car on its return trip as an instrument of injury which was the natural and probable result of his being put off. As to the case so made on the fourth count, the defendant asked the judge to direct a verdict for it; this was refused, and the case is here on a report as to the correctness of that among other rulings.

A majority of the court are of opinion that this ruling should have been given.

At common law, the death of a human being is not the subject of an action for damages. This was established in this Commonwealth by the case of *Carey v. Berkshire Railroad*, 1 Cush. 475.

In that case, which was decided in the year 1848, the difference is pointed out between the way in which the common law has been changed and the wrongful death of a person has been

dealt with by Parliament in England and by the Legislature of this Commonwealth. It is first pointed out that in England, by a then recent act (St. 9 & 10 Vict. c. 93, passed in 1846 and usually called Lord Campbell's act) it was provided that if a person was killed under such circumstances that if he had been injured and not killed the defendant would have been liable, the executor or administrator of the person killed might bring an action for the benefit of the wife, husband, parent or child, in which the jury might give such damages as they should think proportioned to the injury resulting from such death, to the parties, respectively, for whose benefit the action was brought. It is then pointed out that in Massachusetts, by St. 1840, c. 80, if the life of any passenger is lost through the wrongful act of a carrier, such carrier is made liable to a fine not exceeding \$5,000, nor less than \$500, to be recovered by indictment, to the use of the executor or administrator, for the benefit of the widow or heirs. This court then goes on to say: "These statutes are framed on different principles, and for different ends. The English statute gives damages, as such, and proportioned to the injury, to the husband or wife, parents and children, of any person whose death is caused by the wrongful act, neglect or default of another person; adopting, to this extent, the principle on which it has been attempted to support the present actions. Our statute is confined to the death of passengers carried by certain enumerated modes of conveyance. A limited penalty is imposed, as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the Commonwealth."

Indeed the statute as to carriers (St. 1840, c. 80), referred to in *Carey v. Berkshire Railroad*, was not the first act of the kind. The first act of this kind was a highway act passed a little over fifty years before the carrier act of 1840, c. 80. It provided that if the life of a traveller was lost through a defect in a public way the county, town or persons whose duty it was to keep it in re-



pair should "be liable to be amerced in one hundred pounds" for the use of the heirs, devisees or creditors "upon a conviction . . . on a presentment or indictment of the grand jury." St. 1786, c. 81, § 7, now R. L. c. 51, § 17. This act was taken from an earlier provincial statute, Prov. St. 1693-4, c. 6, § 6, 1 Prov. Laws, (State ed.) 137. The provincial statute contained the same provision except that it did not provide that the hundred pounds should be recovered by indictment.

The system of imposing a punishment for wrongfully causing death in place of giving to the family of the deceased an action for compensation has been adhered to and extended since the decision in *Carey v. Berkshire Railroad*, when it applied only to travellers on defective highways and to passengers of common carriers. In 1853 it was extended to cases where a steam railroad had wrongfully caused the death of "any person, not being a passenger or employee . . . such person being in the exercise of due care and diligence." St. 1853, c. 414, now R. L. c. 111, § 267. In 1864 the statute as to steam railroads was extended to street railways, St. 1864, c. 229, § 37, now R. L. c. 111, § 267, in 1871, to collisions at grade crossings where the statutory signals were not given, St. 1871, c. 352, now R. L. c. 111, § 268, and in 1883, employees of steam railroads were put on the same footing, in case they were killed by a steam railroad, as persons who were not passengers. St. 1883, c. 243, now R. L. c. 111, § 267. Employees of street railways had been put on that footing by St. 1864, c. 229, § 37, and in 1897 all persons and corporations were put on the same basis as steam railroads and street railways. St. 1897, c. 416, now R. L. c. 171, § 2. It will be plain, from what is said hereafter, that the employer's liability act, in what is now R. L. c. 106, § 73, which was taken from the English act following Lord Campbell's act, is so far modified by § 74, in spite of what is now § 72, as to be a part of this system.

In *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211, it was decided that where a steam railroad wrongfully causes the death of a passenger the case is within the act and the railroad company is to be punished, although the passenger is not in the exercise of due care and could not have recovered had he been injured only and not killed. This conclusion was reached

on the ground that under the Massachusetts system the corporation is to be punished for wrongfully causing the death of a passenger or other person described in the several acts, and that in this respect it is entirely different from the English system, which generally has been followed in nearly all the States of the United States other than Maine and New Hampshire. The reason for the decision is summed up in this sentence, at page 213: "If the person whose negligence caused the death had been indicted for manslaughter, the negligence of the deceased would not have been a defence. *Regina v. Longbottom*, 3 Cox C. C. 439. *Regina v. Swindall*, 2 Car. & K. 230."

It also is pointed out in the opinion in *Commonwealth v. Boston & Lowell Railroad*, that the case of a death at a grade crossing (originally brought within the system by St. 1871, c. 352) is another instance where the liability of the railroad to be punished is not coterminous with the right which the deceased would have had to damages had he been injured only and not killed. In case of a death at a grade crossing the railroad is punished "unless it is shown that, in addition to a mere want of ordinary care, the person injured . . . was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury."

By St. 1881, c. 199, (that is to say, after the system had been in operation and applicable to the death of a traveller on a defective highway for nearly ninety years and had been made applicable to many other cases since 1840, when it was extended to carriers,) a civil remedy was given in addition to the remedy by indictment, in all cases except where death was caused by a street railway, namely, in case of steam railroads (§ 1), grade crossing accidents (§ 2), carriers (§ 3), and defects in highways (§ 4). And by St. 1886, c. 140, (under which the action now before us was brought,) the omission of street railways from the act of 1881 was remedied. Before St. 1886, c. 140, the only remedy in case of street railways was by indictment. *Holland v. Lynn & Boston Railroad*, 144 Mass. 425.

Two years after it was established in *Commonwealth v. Boston & Lowell Railroad* that an indictment could be maintained for

wrongfully causing the death of a passenger not in the exercise of due care, it was decided that an action of tort could be maintained under St. 1881, c. 199, (Pub. Sts. c. 112, § 212,) for the death of a passenger who was not in the exercise of due care. *Merrill v. Eastern Railroad*, 139 Mass. 252. This conclusion was reached on the ground that so far as the liability of the defendant corporation is concerned, "no distinction can be made between an indictment and an action of tort, under the Pub. Sts. c. 112, § 212." *Merrill v. Eastern Railroad*, 139 Mass. 252, 257. This case was followed in *McKimble v. Boston & Maine Railroad*, 139 Mass. 542, and 141 Mass. 463.

Before and since the decision in *Merrill v. Eastern Railroad*, it has been stated by the court that the effect of these two statutes (St. 1881, c. 199, and St. 1886, c. 140) is to give a civil remedy for the recovery of this penalty (which is imposed by way of punishment) in addition to the remedy by indictment. In *Kelley v. Boston & Maine Railroad*, 135 Mass. 448, 449, C. Allen, J., speaking for the court, said: "But no criminal jurisdiction existing under the earlier statute (St. 1874, c. 372, § 163) is taken away by the St. of 1881, c. 199; and the purpose of the later statute was to give a new remedy to the party by a civil action, in addition to that already existing by indictment." In *Littlejohn v. Fitchburg Railroad*, 148 Mass. 478, 482, Holmes, J., speaking for the court, said: "But the present action is statutory and penal in its character. The statute does not extend the liability for personal injuries to those injuries which cause death, as in *Little v. Dusenberry*, 17 Vroom, 614 (where also, so far as appears, the defendant may have been negligent). It creates a liability of a different nature. The action which it gives to the administrator is merely a substitute for the indictment also provided for, and it is expressly enacted that the damages shall be 'assessed with reference to the degree of culpability of the corporation, or of its servants or agents.'" In *Doyle v. Fitchburg Railroad*, 162 Mass. 66, 71, Morton, J., in delivering the opinion of the court, said: "Originally the remedy was by indictment. Afterwards it was extended to an action of tort. St. 1871, c. 381, § 49. St. 1874, c. 372, § 163. St. 1881, c. 199, §§ 1, 6. But only one of the remedies can be pursued by the executor or administrator. And whether the

amount is recovered by indictment or in an action of tort, it goes in either case to the widow and children and next of kin, and the executor or administrator has no interest in it. It is in substance a penalty given to the widow and children and next of kin, instead of to the Commonwealth, and as such the intestate could not release the defendant from liability for it." And finally, it was held in *Worcester & Suburban Street Railway v. Travelers Ins. Co.* 180 Mass. 263, 264, that a policy insuring the plaintiff "against loss from liability to every person who may . . . accidentally sustain bodily injuries . . . under circumstances which shall impose upon the insured a common law or statutory liability for such injuries," did not cover sums paid by the railway for wrongfully causing the death of some of its passengers.

The conclusion which has been reached as to the character of these two acts (St. 1881, c. 199, and St. 1886, c. 140) could not have been avoided. It had to be held that these acts gave a civil remedy for the recovery of a penalty imposed by way of punishment.

Where a plaintiff's rights are invaded by the wrongful act of a defendant, the question and the only question is how great was the injury done to the plaintiff. But where a defendant is to be punished for a wrongful act done by him, the question and the only question is how serious was the defendant's wrong doing, and the amount of injury inflicted upon the deceased (except so far as it gives character to the wrong doing of the defendant) is altogether immaterial.

At common law damages are given for the full amount of the injury done to the plaintiff where he has an action for a violation of his rights. And where the amount recoverable in such an action is limited by statute (as it is in this Commonwealth where a person is injured but not killed from a defect in a public way, R. L. c. 51, § 18, or where an action is given by the employer's liability act, St. 1887, c. 270, § 3, now R. L. c. 106, § 74, for an injury short of death) the question for the jury is, What damages will compensate the plaintiff for the injury done him, not exceeding the limited amount which by statute can be imposed?

Where a penalty is imposed by way of punishment in a crim-

inal prosecution, the amount of the penalty is fixed by the presiding judge in passing sentence. In case of the statutes we have been considering (imposing a penalty for wrongfully causing death) no statutory provision was necessary as to how the amount of the penalty to be imposed in a particular case was to be ascertained, and none was made, so long as the only remedy provided was by way of indictment. As was stated in *Carey v. Berkshire Railroad*, 1 Cush. 475, 480, "A limited penalty is imposed, as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased."

But when it was provided by statute that an action of tort could be maintained where death was caused through the wrongful act of the defendant, it thereby became the province of the jury to fix the amount of the penalty to be imposed, and it became necessary to specify how the amount of it should be assessed. It was provided that the amount to be recovered in the action of tort was "to be assessed with reference to the degree of culpability of said corporation or of its servants or agents." That fixed the character of the action of tort under these two acts. St. 1881, c. 199, and St. 1886, c. 140. By that provision the effect of these two acts was to give a civil remedy for the recovery of a penalty imposed by way of punishment.

It is not uncommon for an informer to be allowed by statute to maintain a civil action for the recovery of a penalty imposed as a punishment. An action under St. 1881, c. 199, or St. 1886, c. 140, is an action of the same kind, the only difference being that the penalty in these actions goes not to an informer but to the family of the deceased.

The character of these acts imposing a penalty for wrongfully causing death does not seem to have been present in the mind of the court when it was assumed in *McCreary v. Boston & Maine Railroad*, 153 Mass. 300, that the corporation was liable under the statute where an employee who is on its tracks contrary to law is killed through the wanton and reckless acts of a steam railroad corporation, because under those circumstances he could

have recovered had he been injured and not killed. The language of St. 1853, c. 414, § 2, now R. L. c. 111, § 267, is to the contrary. See *Dillon v. Connecticut River Railroad*, 154 Mass. 478, 479. This assumption is repeated in *McCreary v. Boston & Maine Railroad*, 156 Mass. 316. In these cases there was no question of the effect of wanton and reckless acts, and the assumption was not necessary to any of the three decisions.

Inasmuch as "no distinction can be made between an indictment and an action of tort," so far as the liability of the defendant is concerned, the question in the case at bar is this: If the defendant railroad had been indicted for causing the death of Joseph P. Pope, would the evidence introduced at this trial have warranted a finding that the government had proved the averment (which it must have made in the indictment) that Pope, when put off the car, was "in the exercise of due care and diligence"?

By the testimony of the plaintiff's witnesses, Pope was then in such a stupor that he could not be waked either by shaking or kicking. We are of opinion that a person in such a condition could not have been found to have been "a person . . . in the exercise of due care and diligence," had an indictment been resorted to, and therefore cannot be found to have been "in the exercise of due diligence," as he was alleged to have been in the fourth count of the declaration in this action of tort. We use the words "due diligence" in place of the words "due care" found in the Revised Laws, (R. L. c. 111, § 267,) merely because those are the words of the count now in question (the fourth count) and of St. 1886, c. 140, under which this action was brought, and not because there is any distinction between those words and the words of R. L. c. 111, § 267.

Since the Massachusetts acts are exactly what Lord Campbell's act is not, it is of no consequence that in States where Lord Campbell's act has been enacted a recovery can be had under circumstances like those now in question. We refer to *Louisville & Nashville Railroad v. Johnson*, 108 Ala. 62; *Guy v. New York, Ontario & Western Railroad*, 30 Hun, 399; *Gill v. Rochester & Pittsburgh Railroad*, 37 Hun, 107; *Louisville & Nashville Railroad v. Ellis*, 97 Ky. 330; *Weymire v. Wolfe*, 52 Iowa, 533; *Southern Railway v. Webb*, 116 Ga. 152; *Haug*

v. *Great Northern Railway*, 8 No. Dak. 23; *Chicago City Railway v. O'Donnell*, 207 Ill. 478. In each of these States there are acts like Lord Campbell's act. See Ala. Civil Code 1896, c. 2, §§ 26, 27; 1 Rev. Sts. N. Y. (Birdseye) 834; Sts. Ky. 1899, § 6; McClain's Iowa Ann. Code, § 3731, and notes; Ga. Code, 1895, § 3828; No. Dak. Rev. Codes, 1895, §§ 5974-5976; Rev. Sts. Ill. 1898, c. 70, §§ 1, 2.

Neither are the cases of any assistance in which it has been held that a plaintiff could have recovered who had been injured without being killed, under circumstances like those now before us. See *Evans v. St. Louis, Iron Mountain & Southern Railway*, 11 Mo. App. 463; *Kline v. Central Pacific Railroad*, 37 Cal. 400; *Conolly v. Crescent City Railroad*, 41 La. Ann. 57. The Legislature deliberately did not adopt as the test whether the railroad is to be punished the liability which the defendant would have been under to make compensation had the deceased been injured only and not killed. *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211. *Merrill v. Eastern Railroad*, 139 Mass. 252.

It is to be noted that no one of these cases goes further than to hold that in such a case the plaintiff can recover. None of them takes the further step that when he does recover in such a case, he recovers on the ground that he was in the exercise of due care, and not on the ground that he is excused from alleging and proving due care by the fact that when insensible he was exposed to the danger in question by the wrongful act of the defendant. It is also to be noted that *Aiken v. Holyoke Street Railway*, 184 Mass. 269, is a case of direct injury through wanton and reckless acts. *Aiken v. Holyoke Street Railway* is an authority that in such a case a plaintiff need not allege or prove that he was in the exercise of due care. There is no case in which it is held that where wanton and reckless acts indirectly cause damage to the plaintiff the rule of *Aiken v. Holyoke Street Railway* applies.

The words which we have to construe are words originally used in a statute imposing a punishment to be inflicted only on an indictment being found, and are now to receive the same construction as if contained in an indictment. In addition to that, in construing these words it is settled that the

test is not whether the deceased could have maintained an action had he been injured and not killed. The Legislature might have provided that steam railroads and street railways should be punished whenever they caused the death of a human being; but the Legislature did not choose to do that; it chose to confine the liability to persons (not passengers or employees) who were "in the exercise of due care and diligence," to quote the words of the original act of St. 1853, c. 414, § 1, and who are "in the exercise of due diligence," to quote the words of the act now immediately in question, St. 1886, c. 140, and the words of the fourth count of the declaration in the case at bar.

If it be a fact that a person in such a stupor as Pope was in can be said to be by legal intendment negatively and constructively in the exercise of due care, within the meaning of those words when used in a declaration to recover compensation for an injury done to the plaintiff, which we do not concede, we are of opinion that he cannot be held to be in the "exercise of due diligence" within the meaning of those words in St. 1886, c. 140.

It is settled that these words in that statute mean what they have meant and still mean in an indictment under St. 1853, c. 414, § 1, now R. L. c. 111, § 267; and that they are not to be construed as invoking for the test of the defendant's liability under the statute its liability at common law in case of an action for compensation for an injury short of death. Construing these words in the light of what we have shown to be settled by decision, they cannot be held to mean what for the purposes of this discussion we assume without deciding that similar words mean by legal intendment in an action for compensation, but must be taken to have here their ordinary acceptation, and to mean that the person killed, if not a passenger or employee, must have been actively and actually in the exercise of due diligence.

In the opinion of a majority of the court the entry must be, in accordance with the terms of the report,

*Judgment for the defendant on the fourth and sixth counts.*



WINIFRED MULLIN vs. BOSTON ELEVATED RAILWAY  
COMPANY.

MICHAEL MULLIN vs. SAME.

Suffolk. November 11, 1903. — May 18, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Negligence*, On street railway, Injury from fright. *Evidence*, Remoteness. *Practice*, Civil, Exceptions.

In an action against a street railway company by a woman passenger for injuries alleged to have been caused by a collision of another car of the defendant with that in which the plaintiff was a passenger, it appeared, that the plaintiff was sitting on the last seat of an open car of the defendant which had been reversed so that she faced the rear of the car, that the car had stopped, that the tracks had been made somewhat slippery by a shower, and that the motorman of another car of the defendant approaching from the rear, although he applied the brakes and reversed the power in a reasonable and proper manner, was unable wholly to stop his car before the fenders of the two cars came in contact, causing no injury to either car, and causing the other passengers in the car with the plaintiff to feel only the sensation of a jar, that the plaintiff, whose health had been impaired by previous nervous difficulties, seeing the other car approaching and anticipating a collision, took hold of the stanchion at the end of the seat and fainting from nervous fright fell to the floor and sustained superficial bruises, followed afterwards by serious nervous prostration caused by the shock and nervous fright. *Held*, that a finding was warranted that there was no negligence on the part of the defendant. *Whether*, if there had been negligence on the part of the defendant, the plaintiff's injuries could be said to have been due to it, was not considered.

In an action against a street railway company by a woman passenger for injuries sustained in fainting from fright at the anticipated collision of another car of the defendant with the car in which the plaintiff was seated, evidence in behalf of the defendant, that three years before the accident the plaintiff was subject to fainting spells, is competent to contradict a statement of the plaintiff that she never had been subject to fainting fits before the accident, and also as bearing on the truth of the plaintiff's contention that the fainting fits to which she testified that she was subject were caused by the accident.

In an action against a street railway company by a woman passenger for injuries sustained in fainting from fright at the anticipated collision of another car of the defendant with the car in which the plaintiff was seated, the defendant may ask the other passengers on the car in which the plaintiff was seated whether any of them received an injury from the collision, to show that none of them received such an injury, the fact that no injury was received by them having an important bearing on the questions of the force with which the cars came together and of the motorman's alleged negligence.

In an action against a street railway company by a woman passenger for injuries alleged to have resulted in sufferings from nervous shock, the defendant, against

the plaintiff's objection, was allowed to ask the attending physician of the plaintiff, whether he got from the plaintiff or from any one else in her presence any of her family history concerning her mother's physical condition or the mental or nervous condition of her sisters. The witness answered that he never did. *Held*, that the admission of the questions on this subject gave the plaintiff no ground of exception, as owing to the answer of the witness they could do the plaintiff no harm. *Whether* the questions were admitted properly was not considered.

TWO ACTIONS OF TORT, the first for personal injuries to the plaintiff, and the second by the husband of the plaintiff in the first case for consequent loss of her services. Writs dated November 26, 1900.

In the Superior Court the cases were tried before *Braley, J.*, without a jury.

The judge made the following findings of fact:

"On July 7, 1900, the plaintiff Winifred Mullin, wife of Michael Mullin, was a passenger on a car operated by the defendant, which car had stopped. She was sitting on the front seat of the car, the right hand end, which seat was reversed and facing the rear of the car. There had been a slight shower of rain, and the tracks of the defendant's road had become somewhat slippery. Another car owned and operated by the defendant was passing along on the same track towards the rear end of the car in which the plaintiff was seated. By reason of the moisture on the rails, notwithstanding all reasonable and proper efforts used by the motorman in charge of the last car in applying the brakes and reversing the power, the car slid on the rails, and in so sliding the fender of the approaching car came in contact with the fender of the car in which the plaintiff was seated. The force of the impact did not cause any injury to the fender or woodwork of either car; neither were any other passengers, so far as the evidence showed, affected by such impact beyond the sensation of a jar on the part of those who were seated in the car with the plaintiff. The plaintiff, a person whose health had been somewhat impaired by previous nervous difficulties, disclosed by the evidence, seeing the car approaching and anticipating that there would be a collision between the approaching car and the car in which she was seated, reached out her right hand, took hold of the stanchion at the end of the seat, swooned and fell to the floor of the car. Such fall was not caused by the im-

pact of the cars, but was the result of her fainting at the anticipated collision, the fainting fit being caused by nervous fright. In her fall from the seat of the car to the floor of the car she sustained certain bruises of a superficial character of her right upper and fore arms, and also between the thumb and index finger, and thereafter suffered serious nervous prostration, caused by said shock and nervous fright therefrom."

The judge found for the defendant in both cases; and the plaintiff in each case alleged exceptions, which after *Braley, J.* had become a justice of this court were allowed by *Richardson, J.* The questions raised by the exceptions relied on by the plaintiffs appear in the opinion.

*E. B. Callender, (E. M. Shanley with him,)* for the plaintiffs.

*G. H. Mellen,* for the defendant.

MORTON, J. These two actions were tried and argued together. The first is an action by the female plaintiff, whom we shall speak of as the plaintiff, for injuries alleged to have been sustained while a passenger on one of the defendant's open cars in July, 1900. The second is by the husband for the loss of services. The cases were tried by the judge without a jury, and the judge found for the defendant in each case. It was admitted that the plaintiff was in the exercise of due care. The cases are here on exceptions by the plaintiffs to certain rulings in regard to the admission of evidence, and to the refusal to adopt certain instructions that were requested. We think that the rulings were right.

The plaintiff was seated in the car so that she faced towards the rear. There had been a rain and the tracks were somewhat wet and slippery. Another car approached on the same tracks from the rear, and "by reason," as the judge found, "of the moisture on the rails, notwithstanding all reasonable and proper efforts used by the motorman in charge of the last car in applying the brakes and reversing the power, the car slid on the rails, and . . . the fender . . . came in contact with the fender of the car in which the plaintiff was seated." The judge further found as follows: "The force of the impact did not cause any injury to the fender or woodwork of either car; neither were any other passengers, so far as the evidence showed, affected by such impact beyond the sensation of a jar on the part of those who were seated

in the car with the plaintiff. The plaintiff, a person whose health had been somewhat impaired by previous nervous difficulties, disclosed by the evidence, seeing the car approaching and anticipating that there would be a collision . . . reached out her right hand, took hold of the stanchion at the end of the seat, swooned and fell to the floor of the car. Such fall was not caused by the impact of the cars, but was the result of her fainting at the anticipated collision, the fainting fit being caused by nervous fright." The judge also found that as a result of the fall she sustained certain bruises of a superficial nature and thereafter suffered serious nervous prostration caused by the shock and the nervous fright. In view of these findings which were warranted by the evidence we do not see how it can be said that there was negligence on the part of the defendant. Whether, if there was, it could be said that the plaintiff's injuries were due to it, need not be considered. See *Warren v. Boston & Maine Railroad*, 163 Mass. 484; *Spade v. Lynn & Boston Railroad*, 168 Mass. 285; *Gannon v. New York, New Haven, & Hartford Railroad*, 173 Mass. 40; *Berard v. Boston & Albany Railroad*, 177 Mass. 179; *Homans v. Boston Elevated Railway*, 180 Mass. 486; *Cameron v. New England Telephone & Telegraph Co.* 182 Mass. 310. The plaintiff relies on a statement by the motorman made during the course of his cross-examination that he took the risk. But it was for the presiding judge to say what he meant by that statement and whether under the circumstances it was negligent for him to take the risk, and the result of the finding of the judge is that it was not.

The evidence that three years before the accident the plaintiff was subject to fainting spells was competent to contradict her statement that she had never been subject to fainting fits before the accident, and as furnishing some ground for questioning the truth of her claim that the fainting fits to which she testified that she was subject were caused by the accident.

Quite a number of the passengers on the car with the plaintiff were called as witnesses by the plaintiff and the defendant, and against the objection of the plaintiff the defendant was allowed to show by them that none of them received any injury as a result of the collision, and it did not appear that any person besides the plaintiff was injured. The force with which the cars came

together had a bearing upon the question of the alleged negligence of the motorman. One way of judging of the force was by its effect upon the cars and passengers, and it was competent for the defendant to show not only that no injury was done to the cars, but to inquire of the passengers who were witnesses whether any of them received any injury. If none of them did, that fact would have an important bearing on the force with which the cars came together, and on the motorman's alleged negligence.

If the questions that were allowed to be put to the witness who had been the attending physician of the plaintiff whether he got from the plaintiff or from any one else in her presence any of her family history concerning her mother's physical condition or mental or nervous condition and her sisters were improperly admitted, on which we express no opinion, nevertheless no harm was done as the witness answered that he never did. See *Thompson v. Cashman*, 181 Mass. 36.

We have considered the exceptions so far as relied on by the plaintiffs in their brief and we treat the others as waived. The result is that the exceptions must be overruled.

*So ordered.*

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MASSACHUSETTS BREWERIES COMPANY vs. GEORGE E.  
HILLS, trustee.

Suffolk. November 16, 1903. — May 18, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Agency. Assignment.*

An assignment by a liquor dealer of his business and stock in trade to a trustee, to secure the assignor's indebtedness to certain brewing companies which have advanced money to pay for his licenses and certain other indebtedness, the assignor covenanting that he will give his whole time and attention to carrying on his business carefully and economically under the trustee's direction, will pay for all purchases in cash as far as possible, will keep accurate books of account, and will account to the trustee at least once a week for all moneys received or paid out by him less a salary of \$25 a week, with a power of sale in the trustee upon his being satisfied that the assignor is losing money in his business or on a breach of covenant by him, does not make the assignor the agent for the trustee in carrying on the liquor business, and one who has sold beer and ale to the assignor for use in that business cannot sue the trustee for the price.

CONTRACT for \$909.75 for beer and ale sold to the defendant. Writ dated January 15, 1903.

The defendant in his answer set up an assignment dated May 14, 1900, from one Frank Marotta to G. Caspar Niles as trustee and an assignment dated November 15, 1900, from Niles as trustee to the defendant as trustee. The defendant also filed a declaration in set-off for \$353 for money alleged to have been paid under a mistake of fact and interest from May 19, 1900.

In the Superior Court the case was heard by *Mason*, C. J., upon an agreed statement of facts. He ordered judgment for the defendant on the plaintiff's declaration, and ordered judgment for the plaintiff on the defendant's declaration in set-off. The plaintiff appealed. The material facts are stated in the opinion.

The instruments of assignment and of acceptance thereof were as follows :

"Whereas Frank Marotta is carrying on the business of licensed liquor dealer at 176 and 178 North street and 133 to 137 Richmond street, in the city of Boston, under the name and style of Frank Marotta & Company, and licenses for the year beginning May 1, 1900, have been granted by the Board of Police Commissioners of the city of Boston to said Frank Marotta and Frederick Stucke, under the firm name and style of Frank Marotta & Company, but said Frederick Stucke has no interest in said business or said licenses.

"And whereas said Marotta has no funds with which to pay the necessary fees for said liquor licenses, but on the contrary, is largely indebted to the American Brewing Company, the Roessle Brewery, Continental Brewing Company, Casper Berry and a large number of other corporations or individuals, an approximate list of which, with the amounts due each, is hereto annexed.

"And whereas the stock in trade, furniture, fixtures, and other personal property in said Marotta's place of business is subject to a mortgage for fifteen hundred (1500) dollars to one of his creditors, and some of the notes held by other creditors are indorsed by his wife, Angelina Marotta, which mortgage and indorsements said creditors are unwilling to give up.

“ And whereas it appears to be for the interest of said Marotta and of all the creditors that said license fees shall be paid, and said business continued, and on this account said three brewing companies are willing to advance the funds necessary to pay the fees for such licenses, provided said Marotta will hereafter conduct his business in an orderly and economical manner, subject to the directions of the trustee hereinafter named, and as far as possible upon a cash basis, paying the net proceeds and accounting weekly to G. Caspar Niles, as receiver or trustee, and provided also that said Marotta will secure them for such advances by a conveyance of all his right, title and interest in said licenses, and of all his equities and by a conveyance by his wife of all her equities in any real estate to said Niles, all to be held by said Niles upon the trusts hereinafter set forth.

“ Now therefore know all men by these presents, that I, the said Frank Marotta, in consideration of the premises and of one dollar to me in hand paid, the receipt of which is hereby acknowledged, do hereby sell and convey all the furniture, fixtures, stock in trade and all the personal property now on the premises above described on North and Richmond streets, subject to the existing mortgage for fifteen hundred (1500) dollars, also all my right, title, and interest in and to said licenses when they shall have issued, and in and to any and all liquor licenses that shall be granted to me, either alone or with others in succession thereto, and also the good will of my said liquor business and leases to said G. Caspar Niles as collateral security for the payment of my debts in the order hereinafter named, and the performance by me of the covenants hereinafter contained to be by me performed.

“ The proceeds of said collateral security and also all other funds coming into the hands of the trustee are to be applied in the following order, viz. : —

“ First. To the payment of the interest on said mortgage for fifteen hundred (1500) dollars, and on the mortgages on the real estate of my said wife, and the taxes and other necessary charges, and the reasonable compensation of the trustee.

“ Second. To the repayment of all cash advanced by said three brewing companies to pay for any licenses.

“ Third. To the payment or to the proportionate reduction

of the note secured by said mortgage for fifteen hundred (1500) dollars, and all notes endorsed by my said wife.

"Fourth. To the payment or proportionate reduction of all my other debts.

"And I hereby authorize and empower said Niles, or his successor in this trust, or assigns, to sell at public auction or private sale and without notice to me, all my said personal property, good will, stock in trade, and licenses upon becoming satisfied that I am losing money in my business, or upon my making a breach of any of the covenants hereinafter contained to be by me performed, or at the written request of two thirds of my creditors representing more than one half of my indebtedness, and to apply the proceeds to the payment of my debts in the order above named.

"And I, the said Marotta, further covenant and agree with said Niles, trustee as aforesaid, and his successor in said trust and assigns, that I will from this date give my whole time and attention and best efforts to carrying on my said business carefully and economically under his direction, paying for all purchases in cash as far as possible, and will keep or cause to be kept accurate books of account showing my receipts and disbursements, and that I will, at least once in each week, account to said Niles for all monies received or paid out by me, and will then turn over to him all the balance of net receipts, and will retain for myself a salary not exceeding twenty-five dollars a week. This trust shall not continue in any event for more than five years, at the expiration of which time said property shall be reconveyed to said Marotta, or his personal representatives, if his indebtedness shall not then exceed five thousand (5000) dollars, otherwise a sale shall be had for the benefit of the creditors in the order above named.

"Witness my hand and seal this 14th day of May, A. D. 1900.

"Frank Marotta." [Seal.]

"I, the said G. Caspar Niles, hereby accept the above conveyance and the trusts therein contained with the express understanding and agreement that I may retire from said position at any time by assigning all of the above property upon the same trusts to some suitable person, and the acceptance of said trusts by such person, and that I am not to be held personally liable



for any of my acts done under the above assignment except for wilful default or neglect. G. Caspar Niles." [Seal.]

"Know all men by these presents, that I, G. Caspar Niles of Boston, in the County of Suffolk and Commonwealth of Massachusetts, the mortgagee and trustee under a certain mortgage and trust deed of personal property given by Frank Marotta to me, dated May 14th, A. D. 1900, and recorded on the records of the City of Boston with the records of mortgages of personal property, book 963, page 276, in consideration of one dollar and other valuable considerations paid by George E. Hills of said Boston, the receipt whereof is hereby acknowledged, do hereby assign, transfer and set over unto the said George E. Hills, the said mortgage and trust deed and claim thereby secured, and all my right, title and interest in the personal property thereby conveyed subject to the trusts therein set forth.

"In witness whereof, I hereunto set my hand and seal this fifteenth day of November, A. D. 1900.

"G. Caspar Niles." [Seal.]

"I, the said George E. Hills, hereby accept the above conveyance and the trusts therein referred to with the express understanding and agreement that I may retire from said position at any time by assigning all the said trust property upon the said trusts to some suitable person, and the acceptance of said trusts by such person, and that I am not to be held personally liable for any of my acts done under the above assignment except for wilful default or neglect.

"George E. Hills." [Seal.]

"City of Boston, November 16, 1900, 4 & 46 min. P. M. Rec'd & ent'd in records of mortgages, libro 978, folio 239.

"per John T. Priest, Ass't City Clerk."

The mortgage note and mortgage for \$1,500 referred to in the instrument, dated May 14, 1900, had been cancelled and discharged by the payment to the Massachusetts Breweries Company of \$600.

G. F. Ordway, for the plaintiff.

G. E. Hills, trustee, *pro se*.

MORTON, J. This is an action to recover for beer and ale alleged to have been sold by the plaintiff to the defendant. The defendant filed a declaration in set-off. The case was heard

in the Superior Court upon agreed facts, and the judge found for the defendant on the plaintiff's declaration, and for the plaintiff on the declaration in set-off. The plaintiff appealed.

From the agreed facts it appears that one Marotta and one Stucke were carrying on the business of licensed liquor dealers in Boston under the style of Frank Marotta and Company under licenses granted by the police commissioners of Boston. Stucke had no interest in the licenses or the business, but was an employee of the American Brewing Company till that company with others was consolidated into the Massachusetts Breweries Company when he became an employee of the Breweries Company. In May, 1900, Marotta was largely indebted to various persons, firms and corporations including the American Brewing Company, the Roessle Brewery, and the Continental Brewing Company, and was unable to pay for the licenses which were granted to the firm of Frank Marotta and Company for the year beginning May 1, 1900. Thereupon the three companies expressed a willingness to advance the funds necessary to pay for the licenses upon being secured therefor, and the sealed instrument of May 14, 1900, was accordingly executed and delivered by Marotta to Niles, and the companies advanced the funds necessary to pay for the licenses. Niles accepted the conveyance and the trusts therein contained upon the express agreement that he could retire at any time by assigning the property upon the same trusts to some suitable person, and the acceptance of the trusts by such person, and that he should not be personally liable for any of his acts done under the conveyance except for wilful default or neglect. On November 15, 1900, Niles executed to the defendant an instrument by which the defendant succeeded to all the right, title and interest of Niles in the premises. The defendant accepted the conveyance and the trusts therein referred to upon the same terms and conditions as Niles had accepted them. The plaintiff contends that the effect of these conveyances was to constitute Marotta the agent of the defendant, and to make the defendant personally liable for the goods bought by Marotta in carrying on the business after the execution of the instrument of May 14, 1900. But it seems to us plain that the scope and effect of that instrument were to convey the property therein described to Niles

and his successor in the trust as collateral security for Marotta's debts including the sums advanced by the three brewing companies to pay for the licenses, and upon the trusts therein set forth, and to constitute Niles or his successor mortgagee and trustee and not the proprietor of the business. The business is spoken of throughout the instrument as Marotta's business, and he agrees to conduct it in an orderly and economical manner, subject to the directions of the trustee. He covenants with Niles and his successor that he will give his "whole time and attention and best efforts to carrying on my said business carefully and economically under his [the trustee's] direction," that he will pay for all purchases in cash as far as possible, that he will keep accurate books of account, and that he will account to said Niles at least once a week for all moneys received or paid out by him less a salary of \$25 a week. It is manifest that the accounting is to be to Niles or his successor as trustee and not as the owner of the business; — the provision as to salary being a prudent arrangement for all concerned. The conveyance is expressly declared to be "as collateral security for the payment of my debts in the order hereinafter named, and the performance by me of the covenants hereinafter contained to be by me performed." Then follows a statement of the order in which payment is to be made. The trustee or his successor is authorized "to sell at public auction or private sale and without notice to me, all my said personal property, good will, stock in trade, and licenses upon becoming satisfied that I am losing money in my business, or upon my making a breach of any of the covenants hereinafter contained to be by me performed," which is inconsistent with ownership on the part of the defendant or Niles. The whole tenor of the instrument is at variance with the view that Marotta was the defendant's agent, and so also, so far as appears, is the conduct of the parties. For aught that appears, Marotta bought and paid for the goods. Neither the defendant nor Niles so far as appears ever ordered any goods, or were consulted in the ordering of any, or paid any of the bills. There is nothing to show that the goods were charged to them, or that bills were made out to them, or that credit was given to any one except Marotta.

We see no ground on which it can be fairly contended that Marotta was the agent of the defendant or of Niles.

In the case of *Sartwell v. Frost*, 122 Mass. 184, it distinctly appeared that the defendants were carrying on the business, and that the purchasers of the goods were their agents.

*Judgment affirmed.*

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JULIA DONOVAN vs. LYNN AND BOSTON RAILROAD  
COMPANY.

Suffolk. November 17, 1903. — May 18, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Negligence, Contributory.*

Although there is no absolute rule of law that a person to exercise due care must look and listen before crossing the track of an electric street railway, yet the circumstances may be such that a failure to look and listen will be conclusive evidence of a want of due care.

A woman crossing a city street on her way to purchase meat at eleven o'clock on a misty evening, who without looking or listening steps on the track of an electric street railway in front of an approaching well lighted car ten feet distant, which could have been seen from one hundred and fifty to three hundred feet away, and the motorman of which is making a noise in putting on the brakes sufficient to attract attention, is not in the exercise of due care.

TORT by a woman thirty-eight years old against a street railway company for injuries from being struck by an electric street car of the defendant on Chelsea Street near the corner of Call Street in that part of Boston called Charlestown. Writ dated November 6, 1899.

In the Superior Court the case was tried before *Sheldon, J.*, who, at the close of the plaintiff's evidence, ruled at the request of the defendant that the plaintiff could not recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

*M. F. Phelan & E. E. Reardon*, for the plaintiff.

*H. F. Hurlburt & D. E. Hall*, for the defendant.

MORTON, J. This is an action of tort to recover for personal injuries caused by the plaintiff's being struck by one of the defendant's cars as she was crossing Chelsea Street in

185	588
187	245
185	533
f188	'127
185	533
189	585
185	533
190	'386
185	533
d192	106
185	533
d193	'341
f194	'243

Charlestown on the evening of July 8, 1899. At the close of the plaintiff's evidence the judge ruled that she could not recover and directed a verdict for the defendant. The case is here on the plaintiff's exceptions to this ruling and direction.

We think that the ruling was right, and that the plaintiff was not in the exercise of due care. The accident happened at about eleven o'clock in the evening, and the plaintiff was struck by the car just as she was in the act of stepping on to the track. The night was misty and rainy. The plaintiff lived near by and was familiar with the street and the running of the cars. She was on her way to a store to purchase some meat. She testified that as she came to the crossing she looked around and saw that a car was just about as far as Gray Street; that she "just gave a look around and saw another car coming from City Square, quite a distance away, also going towards Chelsea"; that she "walked along the crossing and . . . was struck by a car coming along from Chelsea and going towards City Square"; that she "did not see any car coming from Chelsea; did not hear any gong nor any car." But the uncontradicted testimony of her own witnesses showed that the car which struck her was well lighted, and, notwithstanding the night was misty and rainy, could be seen from one hundred and fifty to three hundred feet away. It also showed that the car was only ten feet away when she stepped on to the track, and that the noise made by the motorman in putting on the brakes was sufficient to attract attention. The distance from the curbing to the track on which she was in the act of stepping when struck was seventeen and a half feet, and her own statement on cross-examination was that she "stepped down on to the cross walk and walked right across on the crossing and was struck"; that she "walked kind of fast"; and all she "noticed was the car which the last time" she "saw it was at Gray Street, and the other car some distance away from me coming out from City Square"; and that she paid no attention to anything except that she was going to some store. If she looked, as she stepped on to the cross walk, it would seem to have been done so hastily and carelessly as to give her no information as to the actual situation on which she was justified in relying, and she passed over the distance between the sidewalk and the track, on which the car was approaching,

and stepped on to the track almost in front of the car without, so far as appears, taking any further precaution to guard against accident. It is true that there is no absolute rule of law that requires that a person should look and listen before crossing an electric street railway track (*Robbins v. Springfield Street Railway*, 165 Mass. 30), but the circumstances may be such that a failure to look or listen will be conclusive evidence of a want of due care. *Hall v. West End Street Railway*, 168 Mass. 461. *Kelly v. Wakefield & Stoneham Street Railway*, 179 Mass. 542. In the present case we think, as already observed, that the circumstances show that the plaintiff was not in the exercise of due care.

*Exceptions overruled.*

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GLOUCESTER WATER SUPPLY COMPANY vs. CITY OF  
GLOUCESTER.

Essex. December 17, 1903. — May 18, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Commissioners. Practice, Civil. Contract, Validity.*

Under St. 1901, c. 386, relating to the compensation of commissioners appointed by the Supreme Judicial Court or by the Superior Court, to hear parties, assess damages and make an award to be returned into court, the court has no power to order the compensation of the commissioners to be taxed as part of the costs or to be paid by one or both of the parties, the statute providing that such compensation as the court shall award to the commissioners shall be paid by the county in which they are appointed. *Seem*, however, that if the parties to the award have made a special contract providing that the parties or the unsuccessful party shall pay the compensation of the commissioners, it will be enforced.

St. 1901, c. 386, relating to the compensation of commissioners appointed by the Supreme Judicial Court or the Superior Court, which by its terms is made applicable to pending cases, applies to a case in which at the time of the passage of the act an award of commissioners is before this court on questions reserved by a single justice for determination by the full court, especially where the compensation of the commissioners is one of the matters reserved for decision.

Payment of costs provisionally by one of the parties to an award of commissioners, while it is before this court does not change the legal status of the award on the subject of costs, the payment being presumed to have been made subject to the action of the court upon the validity and legal effect of this part of the award.

PETITION, filed October 29, 1895, to determine the value of the petitioner's water plant purchased by the respondent on September 24, 1895, under St. 1895, c. 451, § 16.

The case was before this court at a previous stage as reported in 179 Mass. 365. At the present time it came before the court on an appeal by the respondent from the decree of a single justice of this court, recommitting the commissioners' report with directions to the commissioners to report the amount of their compensation to be paid by the parties.

The case was argued at the bar in December, 1903, before *Knoulton, C. J., Morton, Lathrop, Barker, & Braley, JJ.*, and afterwards was submitted on briefs to all the justices.

*A. E. Pillsbury, (C. A. Russell with him,)* for the respondent.  
*R. M. Morse,* for the petitioner.

KNOWLTON, C. J. Commissioners were appointed under the St. 1895, c. 451, to award compensation for the taking of the Gloucester Water Supply Company's property by the respondent. The questions before us relate to the power of these commissioners, under existing legislation, to fix their own compensation to be paid by the parties under their award. The statute now in force, embodied in the R. L. c. 165, § 54, took effect May 3, 1901, and was first enacted in St. 1901, c. 366, as follows: "Whenever, upon a petition for the assessment of damages or in any other proceeding authorized by law one or more commissioners are appointed by the supreme judicial court or by the superior court to hear parties, assess damages and make an award to be returned into court, the court shall award reasonable compensation to each of such commissioners, to be paid by the county in which they are appointed, and not to be taxed in the bill of costs of either party to the action. Section 2. This act shall apply to pending cases as well as to those hereafter begun, and shall take effect upon its passage." This statute covers the whole subject of the compensation of commissioners appointed for such purposes, and it leaves in the commissioners no power to award any compensation to themselves to be paid by either of the parties, and in the court no power to make an order or decree for the payment of any such compensation by any party to the proceeding. *Boston Belting Co. v. Boston*, 183 Mass. 254, 261. It provides fully for the compensation of such

commissioners, to be paid from the treasury of the county. Of course, it does not affect the validity of contracts made by commissioners in their private capacity with parties to such proceedings. If parties choose to make special contracts with commissioners in regard to their compensation, these contracts are enforceable. But in the absence of such contracts, there is no way in which commissioners or the court can compel a party to pay any part of the commissioners' compensation.

By its terms the statute is made applicable to pending cases. In every sense the present case was pending when the act was passed. The rescript from the full court to the county court was not sent until June 19, 1901, a month and a half after the passage of this act. Until then it was not known whether the report of the commissioners would be sustained upon the principal questions raised at the hearing. The whole matter was before the court, and the case might have been recommitted to the commissioners for a rehearing upon important substantive questions. In a special sense it was pending upon the questions relating to the compensation of the commissioners, for their report was attacked in this particular, and was sent back for further hearing before a single justice. The case is still pending, for not only was their original award as to compensation subject to rejection or revision by the court, but it was found by the single justice, who has since heard the case, to be improper and erroneous, as it plainly was. By the decree appealed from, which is now before us, the case was recommitted to the commissioners for a further hearing as to their compensation. The payment of costs in advance, including compensation to the commissioners, which we understand was made by the petitioner, did not change the legal status of the award on the subject of compensation. *Boston Belting Co. v. Boston*, 183 Mass. 254, 261. Presumably it was made provisionally, subject to the action of the court upon the validity and legal effect of this part of the award. It seems plain that this was a pending case which comes within the express terms of the statute.

These commissioners were officers of the court appointed under a special statute, and they were not, by virtue of their appointment, in contractual relations with either of the parties. The most that they could ultimately expect under the existing prac-



tice was that the court, by proper orders if necessary, would make provision for their reasonable compensation. If no statute were passed, they might expect that this compensation would come from the parties under an order of the court. In *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 556, it was decided before the enactment of this statute that such commissioners had power to award costs; but in that case there was no question as to the amount of the commissioners' charges, and it was not intimated that they could arbitrarily fix their own pay, or that in any event they had a right to payment of anything more than a reasonable compensation. If there was a dispute about it the amount to be paid them would be fixed by the court. The present statute simply provides a different source from which their payment is to come. It does not affect the amount of it in the least. Nor can it be said that this kind of provision is in any sense improper or inadequate. Payment from the county treasury is as certain as any future payment can be. The commissioners cannot object that this mode of payment is provided instead of that which might have been adopted at the common law. In the absence of contract, and as officers of the court, they had no right to have their compensation from the parties, if the Legislature saw fit to say that they should be paid from the public treasury.

The St. 1899, c. 458, which went into effect on June 2, 1899, more than a year before the commissioners filed their report, and which applied to pending cases, was substantially like the act which we have been considering, except that the reasonable compensation which might be allowed was limited to \$15 per day. As it was superseded by the St. 1901, c. 366, we need not consider its application to the present case.

*Decree reversed.*

## INHABITANTS OF WRENTHAM vs. NATHAN H. FALES.

Norfolk. January 29, 1904. — May 18, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*School. Contract, Validity. Statute, Repeal.*

A contract, made while St. 1894, c. 498, § 8, was in force, by a resident of a town in this Commonwealth with another town therein to pay for the tuition of his children attending school in the latter town with the consent of the school committee of that town is valid.

The rule, that a statutory right of action is taken away by a repeal of the statute without a saving clause, does not apply to a right of action on an express contract valid by reason of the first statute and made while that statute was in force.

CONTRACT for \$134.30, with interest thereon from the date of demand, alleged to be due to the town of Wrentham for thirty-eight weeks, beginning in September, 1896, and ending in June, 1897, for the tuition of two children of the defendant, a resident of the town of Norfolk, attending school in Wrentham with the consent of the school committee of that town first obtained as required by St. 1894, c. 498, § 8, for which the defendant promised and agreed to pay. Writ dated April 15, 1903.

In the Superior Court the case was submitted on an agreed statement of facts. That court gave judgment for the plaintiff in the sum of \$140.96; and the defendant appealed.

*H. E. Ruggles*, for the defendant.

*E. J. Whitaker*, for the plaintiff.

HAMMOND, J. The defendant, a resident of the town of Norfolk, applied to the school committee of Wrentham for permission to have his children admitted to the public schools of the latter town, and, upon his express promise to pay for such schooling, permission was granted and the children attended the schools for many weeks. After having received in full the benefit for which he thus agreed to pay, the defendant declines to pay upon the ground that the contract was invalid in that the town could not legally enter into it. The chief question here is whether the defence of illegality is well taken.

"The laws of this Commonwealth for the establishment and maintenance of public schools are designed to provide schools in each town or district for the benefit of the inhabitants thereof, and not for the benefit of residents in other towns or districts. It is only in a few exceptional cases, specified by statute, that the inhabitants of one town can send their children to the public schools in any other town; and, except in such cases and upon such conditions as are thus provided by law, towns have no authority to open their schools to children of the inhabitants of other towns. If they do receive children from other towns, in violation of law, they cannot maintain any action against the parents of such children for their tuition, even if there is an express contract to pay it. Such a contract, being founded upon illegality, cannot be enforced." Morton, J. in *Haverhill v. Gale*, 103 Mass. 104, 105. Both parties concede these general principles, but the plaintiff contends that this case falls within the provisions of St. 1894, c. 498, § 8. The question reduced to its lowest terms therefore is, whether this section covers this case.

It is as follows: "Children may, with the consent of the school committee first obtained, attend schools in cities and towns other than those in which their parents or guardians reside; but when a child resides in a city or town different from that of the residence of the parent or guardian, for the sole purpose of attending school there, the parent or guardian of such child shall be liable to pay such city or town for tuition, a sum equal to the average expense per scholar for the period during which the child so attends."

The contention of the plaintiff is that the first part of this section authorizes the school committee of any town to permit the children of another town within this State to attend school in the former; and that such being the case a special contract between such school committee and the parent of the children that he shall pay for such schooling contemplates no violation of law and is not illegal. The contention of the defendant is, first, that the statute does not authorize the children of one town to attend the schools of another town; second, that even if it does, the school committee of the town in which the parent resides, and not that in which the child attends school, is the one whose consent must first be obtained; and third, that it clearly appears

from the reading of the whole section that liability to pay attaches only in a case where the "child resides in a city or town different from that of the residence of the parent or guardian, for the sole purpose of attending school there."

The language of the first part of the statute is very broad, and we think covers the case of children whose parents reside in this Commonwealth. In *Haverhill v. Gale*, *ubi supra*, the defendant resided in the State of New Hampshire, and the case was decided in his favor upon the ground that the section upon which the plaintiff there relied, which, so far as material to this point, was like St. 1894, c. 498, § 8, the one now under consideration, was "to be construed in connection with the system of legislation of which it forms a part; and applies only to the children of parents who reside within the Commonwealth."

We think it plain also, that the school committee whose consent is required must be that of the town in which is situated the school which the child desires to attend. The interpretation for which the defendant contends would subject the schools of any one town to a liability to be overrun by children residing in adjoining towns at the will of the various school committees of such adjoining towns, and would seriously interfere with the supervision of the schools of a town by its own school committee. Such a view of the statute is inconsistent with the general policy that the schools of any one town shall be under the supervision of the school committee of that town, is unreasonable, and is not to be adopted except upon the clearest expression of legislative intention to that effect. It follows that the children of the defendant were legally in the schools of Wrentham, so long, at least, as this statute stood.

As to the third contention of the defendant that a liability to pay attaches only in the case where the "child resides in a city or town different from that of the residence of the parent or guardian, for the sole purpose of attending school there," it is to be noted that the liability to enforce which this suit is brought is not one imposed by statute, but one arising out of an express contract of the defendant. Even if the statute imposed no liability upon the defendant, an express contract upon his part is not thereby necessarily illegal. The question is not whether the statute imposes upon him a liability, but whether it permits him

to impose one upon himself. The contract, as we have seen, under which he sent his children to school, contemplated no violation of law. The school committee of Wrentham made it possible for the defendant to send his children to the schools of that town under the law, and hence so far as appears there is no illegality in the contract.

It is further urged by the defendant that even if the contract was valid, no action can now be maintained upon it because the statute which we have been considering was repealed by St. 1898, c. 496, § 36, and there was no saving clause; and he relies upon the principle that where a statutory right of action is given the repeal of the statute without a saving clause destroys the right. But this principle is not applicable. The right of action in this case does not depend upon a statute, but upon an express contract of the defendant, and therefore is to be enforced under the rules applicable generally to contracts.

It is also urged that after the repealing statute of St. 1898, c. 496, the children were not legally in the schools of Wrentham, and the defendant cannot legally be held for the time after that statute went into effect. We have not found it necessary to consider this point because under the stipulation of the parties it does not seem open to the defendant in this court.

As we are of opinion that "the plaintiffs are entitled to recover," judgment in accordance with the terms of the stipulation is to be entered for the plaintiffs, \$140.96, with interest from the date of the writ; and it is

*So ordered.*

FRANK J. CASHIN vs. NEW YORK, NEW HAVEN, AND  
HARTFORD RAILROAD COMPANY.

Plymouth. January 29, 1904. — May 18, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Evidence, Of verbal act showing mental condition, Of exclamations showing pain, Records. Practice, Civil, Exceptions.*

In an action for injuries caused by a railroad collision, from which the plaintiff was alleged to have suffered mental injury resulting in melancholia, the plaintiff's wife, called as a witness in his behalf, can testify that she heard the plaintiff say that "if he didn't have children he would commit suicide," as a verbal act tending to show the plaintiff's mental condition, there being nothing to show that this was part of a private conversation.

On the question of the plaintiff's condition alleged to have been caused by a railroad collision, a witness may be asked "What have you observed, if anything, about his suffering from headaches when you have been there?" and can answer that he has seen the plaintiff come out of his room with his hands on his head saying "Oh, Joe, God Almighty, if I could only get rid of these headaches," and the exclamation showing present pain is none the less admissible as such if it also carries an idea of similar past pain, in regard to which it would not be admissible.

Where a question to a witness is excepted to, and the question is allowed and answered, and the excepting party does not further except to the answer or ask the judge to strike out any part of it as non-responsive, he cannot afterwards contend in this court that a non-responsive portion of the answer is inadmissible, if the question itself and the responsive portion of the answer are admissible.

Books kept in a hospital containing entries made in regard to the cases treated there are not public records, not being kept under any requirement of law, and where it is not shown that the person who made the entries is dead or cannot be produced such books are not admissible in evidence, especially if it does not appear that they are complete and perfect records.

TORT, against a railroad company, for personal injuries caused by a collision of trains of the defendant. Writ dated September 20, 1902.

At the trial in the Superior Court before *Harris, J.*, the liability of the defendant was admitted, and the case was tried for the assessment of damages.

The plaintiff's wife, called as a witness in his behalf, was asked the question: "Will you state any things of speech which you have heard bearing upon the question of his melancholy disposition?" The defendant objected, and the judge al-

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lowed the question. The witness answered "I have heard him say if he didn't have children he would commit suicide."—

Q. "More than once have you heard him say it?" A. "Several times."—Q. "When have you noted chiefly expressions of that sort?" A. "Particularly after he has a severe headache."

The question put to the witness Barnes, referred to in the opinion, was as follows: "What have you observed, if anything, about his suffering from headaches when you have been there?" The witness began his answer as follows: "Why, when I have gone to the house and he has been in the bedroom, that is, lying down, his wife has called him and told him that Joe was here and wanted to see him; he had come out of the room with his hands to his head, 'Oh, God Almighty, Joe, —'"

The defendant's counsel objected to the witness testifying to statements made to him by the plaintiff, and a colloquy, mentioned in the opinion, ensued between the judge and the counsel on both sides. The judge allowed the question, subject to the defendant's exception. The witness then answered: "He has come out the room, when I have met him at the door with his hands on his head, and he says: 'Oh, Joe, God Almighty, if I could only get rid of these headaches; if they would only put me back where I was before, I wouldn't give a damn.'" No motion was made to strike out any portion of this answer.

The books offered by the defendant as records of hospitals, which are mentioned in the opinion, were books kept in the Mercy Hospital of Springfield and the Springfield Hospital, at both of which the plaintiff was a patient after his injuries, showing the entries made in regard to the cases treated there including a statement of the diagnosis. The books were excluded, subject to the defendant's exception.

The jury returned a verdict for the plaintiff in the sum of \$89,045; and the defendant alleged exceptions.

*F. S. Hall*, for the defendant.

*S. L. Whipple*, for the plaintiff.

HAMMOND, J. One of the claims made in behalf of the plaintiff was that the accident had caused serious mental injury, resulting among other things in melancholia. As bearing upon his mental condition in that respect, the testimony of the wife that she had heard him say "if he didn't have children he would

commit suicide," was plainly admissible. It was a verbal act which tended to show the mental condition. *Lane v. Moore*, 151 Mass. 87. *Hayes v. Pitts-Kimball Co.* 183 Mass. 262, 263, and cases cited. It is suggested in the defendant's brief that this was a private statement by a husband to his wife, but no such suggestion was made at the trial and there is nothing in the record to show that the statement was part of a private conversation.

The question put to the witness Barnes so far as it sought to show exclamations of present pain was admissible. After a colloquy between counsel on each side and the judge, in which counsel for the plaintiff expressly disclaimed any purpose except to show expressions or ejaculations of present pain and expressly told the witness that if the plaintiff said "he was sorry his head did ache, or that he wished he could be back where he was before," the witness "need not put that in," the judge said in substance that the witness might answer the question so far as it called for any statement as to a then alleged existing pain and condition. The whole colloquy shows that the question called only for ejaculations of pain, and that the judge admitted it solely for that purpose. The witness, however, with a perversity which it may be argued was not due to ignorance on his part as to the proper scope of the question, — a kind of perversity quite common where a witness whose sympathies are enlisted has something which he is anxious to say, — answered the question in a very objectionable manner, and in direct opposition to the instructions given him by the counsel who called him. That part of the answer which ends with the word "headaches," when taken in connection with the statement that at the time of the exclamation the plaintiff had his hands upon his head, may be regarded as an exclamation and ejaculation of present pain. And it is none the less so even if it also carries an idea of similar past pain. So far as it was an ejaculation of present pain it was admissible and was therefore rightly admitted, but it was not to be considered as any evidence whatever of similar prior pain. The rest of the answer was inadmissible. Since the question and a part of the answer were admissible, it was the duty of the counsel for the defendant, if he desired to object to any part of the answer as going beyond the proper scope of the



question, to call the attention of the judge to that fact by moving to strike out the part of the answer which was not responsive. Inasmuch as he did not take that course, the judge and opposing counsel were warranted in assuming that he relied upon his general objection to the question and not upon any specific objection to the answer, and that he regarded the whole answer as responsive and within the proper scope of the question. Under these circumstances, he must stand upon the general objection to the question, and upon that matter the fact that some portion of the answer not responsive to the question was admitted, is not material. It is to be assumed that in the instructions to the jury the proper bearing and scope of the answer was stated to the jury.

In the case of the books which were offered as records of the respective hospitals, it was not contended that as to either institution the records were kept under any requirement of law. They were therefore not public records, and were not admissible, unless supported by the testimony of the one who made them, if that person were still alive and capable of being produced to testify. *Kennedy v. Doyle*, 10 Allen, 161, 165. See also *Townsend v. Pepperell*, 99 Mass. 40, where the record was admitted evidently upon the doctrine that, it being more than thirty years old, there was no need to show the death of the person who made it. In the present case the judge may well have found upon the evidence as to each hospital, both that the records were imperfect and that there was no reason to suppose that the writers could not be produced. The records upon such a finding were properly excluded.

*Exceptions overruled.*

MATTHEW MOONEY vs. EDISON ELECTRIC ILLUMINATING  
COMPANY & others.

Suffolk. March 7, 1904. — May 18, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

*Way, Defect in highway. Contract, Implied: Common counts. Joint Tortfeasors. Pleading, Civil.*

If a city is liable under the highway act for negligently allowing a street which has become charged with electricity through the negligence of a corporation to remain thus charged, the city, in case of a judgment against it on such liability, can maintain an action against the corporation to recover what it has paid on the judgment.

A cause of action at common law against an electric lighting company and a street railway company for injuries alleged to have been caused by the negligence of those corporations in allowing a highway of a city to become charged with electricity cannot be joined with an alleged cause of action against the city under the highway act for negligently suffering the highway to remain thus charged, and a declaration on these alleged causes of action against the corporations and the city as joint tortfeasors is bad on demurrer.

TORT against the Edison Electric Illuminating Company, the Old Colony Street Railway Company and the city of Boston, for injuries alleged to have been received by the plaintiff while lawfully travelling on Centre Street, a highway of the city of Boston, at or near Cass Street in that city, through the alleged negligence of the defendant corporations, by reason of which Centre Street became charged with electricity, and through the alleged negligence of the defendant city in suffering the highway to remain so charged, whereby it was rendered and remained dangerous and defective, causing the plaintiff's injuries, with allegations of notice to the defendant city of the time, place and cause of the plaintiff's injuries. Writ dated September 5, 1902.

The city of Boston demurred to the declaration on the grounds, that the declaration did not state a legal cause of action against that defendant, and that the city was not liable jointly with the other defendants upon the alleged facts.

The Superior Court sustained the demurrer and ordered judgment for the city of Boston. The plaintiff appealed.

*T. F. Meehan*, for the plaintiff.

*S. M. Child*, for the city of Boston.

HAMMOND, J. The plaintiff seeks to hold the two private corporations upon the ground that by their negligence the highway became charged with electricity, and the city of Boston upon the ground that it negligently suffered the highway to remain thus charged. As against the first two the liability rests solely upon the common law; as against the city, solely upon the statute. The private corporations had nothing to do with the negligence charged against the city, and the city had nothing to do with the negligence charged against the private corporations. The liability of the city depends upon statutory conditions and is limited in amount, while the liability of the other defendants depends upon conditions entirely different, and is measured only by the amount of damages suffered by the plaintiff. As between the defendants the liability of the private corporations is primary, that of the city secondary; and the city, in case of a recovery against it, could maintain an action against these other defendants to recover what it paid. *Boston v. Coon*, 175 Mass. 283, and cases cited.

From these considerations it is plain that neither in fact nor in legal intentment are these defendants joint tortfeasors. They therefore cannot be held as such, and the declaration is bad. For cases illustrative of the principle involved, see *Parsons v. Winchell*, 5 Cush. 592; *Mulchey v. Methodist Religious Society*, 125 Mass. 487; *Ridley v. Knox*, 138 Mass. 83; *Dutton v. Lansdowne Borough*, 198 Penn. St. 563.

*Demurrer sustained.*

KITTIE B. BOWDEN vs. MARLBOROUGH ELECTRIC MACHINE  
AND LAMP COMPANY.

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Middlesex. March 8, 1904. — May 18, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence, Employer's liability.*

In an action for personal injuries, by an employee of the defendant, it appeared that the plaintiff, a girl fifteen years of age and immature for her years, was set to work in the defendant's factory on a machine used to cut platinum wire, that at the back of the machine a large and a small cog wheel were geared together, and the plaintiff might have seen them as she was walking about the machine, that a workwoman who worked on the machine instructed the plaintiff how to start and stop it. The machine was stopped by pressing a lever which moved back a clutch and disconnected the power. The plaintiff testified that the workwoman who instructed her told her to take hold of the large wheel with her hand after pressing with a file on the lever, and that the workwoman was accustomed to take hold of the wheel to stop it after pressing the lever, as it would not stop at once when the power was disconnected. On the third day of the plaintiff's employment the workwoman went away, and the plaintiff, being alone with the machine, pressed with the file to stop it, and then took hold of the rim of the wheel, but her pressure on the lever did not draw back the clutch far enough to disconnect the power, and her hand was carried over the top of the wheel and drawn into the gearing on the back side, and injured. *Held*, that there was evidence on which a jury might find that the instructions given to the plaintiff were insufficient or misleading to such a degree as to leave the plaintiff unreasonably exposed to danger, and might find that the workwoman representing the defendant in giving the instructions ought to have known that further instructions were needed for so young, unintelligent and inexperienced a person as the plaintiff.

TORT, by a girl fifteen years of age when injured, for injuries from having her right hand caught between the cog wheels of a machine for cutting platinum wire on which she was at work in the defendant's factory. Writ dated January 1, 1902.

At the trial in the Superior Court before *Stevens, J.*, the defendant asked the judge to rule that upon all the evidence the plaintiff could not recover, and also to rule that the danger of injuring one's fingers if they are caught between revolving gears is an obvious danger as a matter of law and it does not avail the plaintiff to say that she did not appreciate it, as the law presumes that she appreciated it.

The judge refused to rule as requested, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of \$300; and the defendant alleged exceptions.

*C. F. Choate, Jr.*, for the defendant.

*J. J. Shaughnessy*, for the plaintiff.

KNOWLTON, C. J. The plaintiff was injured by catching her fingers in revolving cog wheels on a machine in the defendant's factory, and she sues to recover for her injury. The only question argued is whether there was evidence of negligence on the part of the defendant.

The plaintiff was a girl of fifteen years of age, and there was evidence that she was immature for her years. She was set to work on a machine which was used to cut platinum wire. On the back of the machine opposite where she sat at her work, a large and a small cog wheel were geared together, and she might have seen them as she was moving about the machine. In different parts of her testimony she made conflicting statements as to whether she ever noticed the small cog wheel. She began to work on Thursday afternoon and was injured on Saturday. The machine was stopped by pressing a lever which moved back a clutch and disconnected the power. One Miss McCarthy who worked on the machine, instructed her how to start and stop it, and the plaintiff testified that she was told to take hold of the large wheel with her hand, after pressing with a file on the lever, and thus to stop it. This wheel, which was about a foot in diameter, revolved at about the height of her head, the upper part moving backward from her face. She testified that Miss McCarthy was accustomed to take hold of it with her hand to stop it, after pressing the lever, as it would not stop at once when the power was disconnected. On Saturday Miss McCarthy went away, and the plaintiff, being alone at the machine, pressed with the file to stop it, and then took hold of the rim of the wheel, and her hand was carried over the top and down into the gearing on the back side, nearly on a level with the axis of the wheel. It seems that her pressure on the lever did not draw back the clutch far enough to disconnect the power.

The only question is whether the jury might find the instructions given her insufficient or misleading to such a degree as to leave her unreasonably exposed to danger. In this respect did

the defendant neglect the duty which it owed her as a young and inexperienced person? The question is not free from difficulty, but we are of opinion that there was evidence for the plaintiff proper for the consideration of the jury. She probably had no appreciation of the risk of a failure completely to draw back the clutch by the pressure of the file on the lever, and of the risk that in taking hold of the rim of the large wheel she would encounter enough power to carry her hand entirely over to the back side of the machine, and bring her fingers into the gearing. It was not a kind of danger that would be likely to suggest itself to a young and unintelligent and inexperienced person. Miss McCarthy represented the defendant in giving the plaintiff instructions, and we are of opinion that the jury might find, on the plaintiff's evidence, that she ought to have known that further instructions were needed. *Wheeler v. Wason Manuf. Co.* 135 Mass. 294. *De Costa v. Hargraves Mills*, 170 Mass. 375. *Joyce v. American Writing Paper Co.* 184 Mass. 230.

*Exceptions overruled.*

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### COMMONWEALTH vs. SIMON ALEXANDER.

Suffolk. November 16, 1903. — May 19, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Lord's Day. Statute. Words, "Proceeds."*

Under R. L. c. 98, § 2, a religious or charitable society lawfully may give a public vaudeville entertainment on the Lord's day if the excess of the receipts over the expenses is to be devoted exclusively to a charitable or religious purpose, the word "proceeds" as used in the statute meaning the net returns of the entertainment after the payment of necessary expenses.

Criminal statutes are to be construed strictly and cannot be enlarged by implication.

KNOWLTON, C. J. This is a criminal complaint brought under R. L. c. 98, § 2, for a violation of the statute in relation to the observance of the Lord's day. This section is as follows: "Whoever, on the Lord's day, keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, or takes part in any

sport, game, play or public diversion, except a concert of sacred music or an entertainment given by a religious or charitable society the proceeds of which, if any, are to be devoted exclusively to a charitable or religious purpose, shall be punished by a fine of not more than fifty dollars for each offence; and the proprietor, manager or person in charge of such game, sport, play or public diversion, except as aforesaid, shall be punished by a fine of not less than fifty nor more than five hundred dollars for each offence."

The Congregation Beth Israel is a corporation organized under general laws for religious purposes, and having its place of worship in Cambridge. Its purpose according to its charter is "the establishment and maintenance of a synagogue for the public worship of God in accordance with the principles and doctrines of the Hebraic religion, and for such other charitable, benevolent and religious objects as the corporation may from time to time deem advisable." The corporation received a license from the selectmen of Revere "to conduct a charitable entertainment at Crescent Garden, Boulevard, on Sunday afternoon and evening, August 9, 1903." A committee of four members was appointed by vote of the corporation, to take charge of the entertainment, and the defendant was made chairman of the committee. On this Sunday the defendant was in charge of the entertainment which was given under the auspices of the corporation, and which consisted of songs, and other features commonly known as vaudeville. The public was admitted to the entertainment, an admission fee was charged, and the total receipts were taken by the committee. Incidental expenses for the performers, lights, attendance and other things were paid by the committee, and the balance was retained and paid to the corporation.

Upon these facts the defendant asked the judge to rule that he was entitled to an acquittal as matter of law, and the question before us arises upon the refusal of the judge to give this ruling.

The only charge in the complaint is that the defendant "was the person in charge of a certain public diversion, to wit, a theatrical performance given on said day," etc. The statute above quoted is the only one which he is charged with having

violated. The only question is whether he was within the exception. The report states that this was an entertainment given by the religious society referred to. It is not contended, and it cannot successfully be contended, that the corporation is not a religious society within the meaning of the exception. According to the terms of its charter, it is both a religious and charitable society, and if it is either, it is within the language of the exception. The balance of receipts above expenses was paid over to the corporation which gave the entertainment, and the only proper inference is that it was to be devoted exclusively to the purposes of the corporation, which were religious and charitable. The district attorney in his brief says: "It is not contended, however, by the Commonwealth that in the case at bar the intent of the defendant was other than to devote the surplus to a religious purpose, to wit: the purposes of the church which he represented."

The principal argument for the Commonwealth is that the term "proceeds" in the statute means the entire gross receipts, and that the exception cannot avail a religious or charitable society in any case where any part of the money received, however small, is used for the payment of any expense incidental to the entertainment. We think that this is too narrow a construction of the statute, and that if adopted it would defeat the purpose of the Legislature in reference to such societies. Probably there is hardly any entertainment given by a religious or charitable society in which there is not some payment for expenses. We think the meaning of the word "proceeds" is that which finally results or proceeds from the entertainment, taking into account not only that which is received, but that which is incidentally and properly paid out. The proceeds are the net returns after the payment of necessary expenses.

The proof shows that the defendant is within the exception of the statute in every particular. Management of an entertainment, such as is referred to in the exception, does not subject a person to punishment. There is no statute that makes a manager of such an entertainment an offender. This is a criminal law, and criminal statutes are to be construed strictly. The court cannot extend or enlarge a statute to create an offence which is not created by the language of the enactment.



Doubtless the Legislature did not intend to open a door for the giving of theatrical performances for the diversion of the public on the Lord's day. Probably no one thought it possible that a religious or charitable society would give such an entertainment to obtain money for a charitable or religious use. It was doubtless supposed that the provisions adopted in the exception were a sufficient safeguard against the giving of improper entertainments on Sunday. So the statute excepts all entertainments given by a religious or charitable society, the proceeds of which are to be devoted exclusively to a charitable or religious purpose. There may be religious or charitable societies that do not object to an entertainment of vaudeville on secular days, if they object to them on holy days. There may be religious societies according to whose belief and observance Sunday is a secular day. Persons of such a belief are referred to in R. L. c. 98, § 4.

The exception which we have been discussing, and which is referred to again in similar language in R. L. c. 98, § 5, and c. 102, § 172, was not stated in terms sufficiently guarded to accomplish the probable purpose of the Legislature. But this does not enable the court to amend the statute by declaring that certain kinds of entertainments may be given, and that certain others are prohibited. The remedy, if any is needed, must come from the Legislature. In the opinion of a majority of the court the entry must be

*Verdict set aside.*

The case was submitted on briefs at the sitting of the court in November, 1903, and afterwards was submitted on briefs to all the justices.

*J. P. Leahy*, for the defendant.

*J. D. McLaughlin*, Second Assistant District Attorney, for the Commonwealth.

## T. DENNIE BOARDMAN vs. CHARLES S. HANKS.

Suffolk. November 17, 1903. — May 19, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Agency. Broker.*

If a real estate broker is employed to procure an option to purchase certain real estate at a price named, and does so, but his customer after obtaining the option decides not to purchase the property, the broker is entitled to a commission only on the price paid for the option and is not entitled to a commission on the price at which his customer acquired the right to purchase the property.

*Semble*, that if a real estate broker procures for a customer an option to purchase certain real estate at a price named, and the customer avails himself of the option by purchasing the property, the broker, in the absence of an agreement as to his compensation, is entitled to a commission on the amount of the purchase money and not merely on the price of the option.

MORTON, J. This is an action by a broker against his principal to recover commissions. The declaration contained ten counts and alleged an employment of the plaintiff by the defendant to effect a purchase and sale of certain real estate called Misery Island at the mouth of Salem Harbor, and that he effected such purchase and sale, and also that he was employed by the defendant to obtain an option for the purchase and sale and did so. The case was heard by the Chief Justice of the Superior Court without a jury. The Chief Justice found "that the defendant did not employ the plaintiff in any capacity whatever to purchase or sell the real estate, . . . nor did the plaintiff buy or sell said real estate, nor did any services of the plaintiff in relation thereto bring about any purchase or sale of said real estate." The Chief Justice also found that the plaintiff was employed as a real estate broker by the defendant to obtain from one Mason an option for the purchase of the real estate for the sum of \$100,000, and that the plaintiff procured the option for which \$1,000 was paid, and subsequently, at the request of the defendant, procured an extension of the option for \$500, but that no purchase or sale resulted from the option. The Chief Justice further found that there was no agreement as to the plaintiff's compensation for obtaining the option other than that implied

by law from the employment, and in effect ruled that the plaintiff was entitled to reasonable compensation, and that reasonable compensation would be two and one half per cent on the value of the option, which he found was \$1,500. The Chief Justice accordingly found and ordered judgment for the plaintiff for the sum of \$37.50. The plaintiff duly excepted.

We think that the ruling was right. If the plaintiff had been employed by the defendant to purchase the property, and had procured, as he did, from the owner or the person representing him, a valid and binding agreement to sell, and the defendant had for any reason declined to go on with the transaction and complete the purchase, it is clear that the plaintiff would have been entitled to his commission. *Fitzpatrick v. Gilson*, 176 Mass. 477. So, if the plaintiff had been employed by the defendant to procure an option as incident to a negotiation for a contemplated purchase, and had done so, and the defendant had availed himself of the services rendered by the plaintiff in procuring the option to purchase the property, we cannot doubt that the plaintiff would have been entitled to compensation for the purchase thus effected. But neither one of these things happened in this case. The plaintiff was not employed by the defendant to purchase the property, but simply to get an option, and the defendant did not avail himself of services rendered by the plaintiff in procuring an option as an incident in negotiations for a purchase, to make the purchase. The option gave the defendant the right to purchase the property or not as he saw fit. He decided not to purchase, as he had a right to do and as the plaintiff understood that he might do when he undertook to procure the option. We see no ground on which it can be held that the plaintiff is entitled to the same compensation to which he would have been entitled if he had been employed to purchase the property. In that case the situation would have been an entirely different one. What the plaintiff was entitled to was reasonable compensation for the services rendered in procuring the option, and the Chief Justice so ruled, and must be deemed so to have found.

*Exceptions overruled.*

*H. E. Bolles*, (O. O. Partridge with him,) for the plaintiff.

*H. E. Warner*, for the defendant.

DAVID ATWOOD & another vs. BOSTON FORWARDING AND  
TRANSFER COMPANY.185 557  
f187 2498

Suffolk. November 19, 1903. — May 19, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Damages, In tort. Animal. Interest.*

If a horse is injured through the fault of another, and the owner reasonably expends money in the expectation of curing him but notwithstanding his endeavors the horse has to be killed, the owner may recover for the money thus expended in addition to the value of the horse.

In an action by the owner of a horse that was injured through the fault of the defendant and had to be killed after money reasonably had been expended in trying to cure him, it may not be error to instruct the jury to add interest in making up their verdict, for, although interest as such is not allowed in such a case, the jury in determining the amount of the damages may consider the lapse of time since the injury and the fact that the assessment is to be made on the day of the verdict for an injury which occurred a long time before.

TORT, for injuries to the plaintiffs' horse causing his death, and for expenses incurred by the plaintiffs in caring for and attempting to cure the horse. Writ in the Municipal Court of the City of Boston dated October 11, 1901.

On appeal to the Superior Court the case was tried before *Pierce, J.* It appeared, that the plaintiffs' horse had been left standing in front of their store, and that one of his fore feet was run over by a rear wheel of a truck of the defendant.

At the close of the evidence the defendant requested the judge to rule, that the damages that could be recovered in this case could in no event exceed the value of the horse at the time of the injury.

The judge refused to rule as requested, and upon the question of damages instructed the jury as follows:

"If you find in favor of the plaintiffs they are entitled to recover the value of this horse as of the day of the injury, and if you find in addition that the plaintiffs had a reasonable expectation that the horse could be cured and that the injury which came to him might be lessened if they should attempt to cure it, then the plaintiffs may recover, in addition to the value of the horse, such a sum of money as in attempting to cure the horse they reasonably and prudently expended.

"If you find both of these things, you will add the two sums together and you will compute interest thereon at six per cent upon either one or the other of those two sums as the facts may be proven to you by the testimony. That is to say, if you find that they did not reasonably and prudently expend the additional sum with a reasonable expectation of curing the horse and thereby lessening the damage which should come to this defendant or themselves, then you will find the value of the horse and interest thereon from the date of the injury.

"If you find there was a reasonable anticipation of cure and that the money was reasonably, prudently and economically expended you will compute interest upon the two sums added together, from the 21st day of September, the time the money was expended and when the final result of this injury was definitely ascertained."

The jury returned a verdict for the plaintiffs in the sum of \$278.31; and the defendant alleged exceptions.

*W. B. Grant*, for the defendant.

*H. A. Richardson*, for the plaintiffs.

KNOWLTON, C. J. The plaintiffs' horse was seriously injured through negligence for which the defendant is liable, and after unavailing efforts for nearly a month to cure him, he was killed. The exceptions relate to the question whether the plaintiffs, having a reasonable expectation that the horse could be cured and that their damages could be lessened by an attempt to cure him, are entitled to recover such a sum as they reasonably and prudently expended in making this attempt. The defendant asked the judge to rule that in no event can the damages exceed the value of the horse at the time of the injury.

When an animal is killed through the fault of the defendant, the damage which the owner may recover is the value of the animal at the time of the injury. But if an animal is injured in such a way that proper care and attention reasonably may be expected to effect a cure, which will leave the damage from the injury much less than if he died, it is the duty of the owner to give it such care and attention, in order that the damages may not be augmented by neglect. *Tindall v. Bell*, 11 M. & W. 228. *Groves v. Moses*, 13 Minn. 335, 337. The expense properly incurred for this purpose is a part of the damage to the owner, for

which he is entitled to compensation, as well as for the diminution in value or other loss that may finally result directly from the injury notwithstanding these efforts. *Gillett v. Western Railroad*, 8 Allen, 560. *Johnson v. Holyoke*, 105 Mass. 80. *Wheeler v. Townshend*, 42 Vt. 15. *Streett v. Laumier*, 34 Mo. 469. These expenses, reasonably incurred in making a proper effort to diminish the loss, are to be paid as well when the effort is unavailing as when it is successful. It would be most unjust to impose upon an owner the duty of trying to effect a cure, if that is what ought to be done, and to leave him remediless for expenses so incurred, if his attempt proves unsuccessful. Of course he is bound to act in good faith and to exercise a sound discretion, so as not to make an unreasonable expenditure, in reference to the probability of diminishing the damages; but if money is prudently expended in the hope of mitigating the injury, and notwithstanding this the animal is lost, there is no good reason why this expense, as well as the value of the animal, should not be included as a part of the damages. This is in accordance with the weight of authority. *Watson v. Proprietors of Lisbon Bridge*, 14 Maine, 201. *Commissioners of Sullivan County v. Arnett*, 116 Ind. 438, 444. *Gulf, Colorado & Santa Fe Railway v. Keith*, 74 Tex. 287. *St. Louis, Iron Mountain & Southern Railway v. Biggs*, 50 Ark. 169. See also *Ellis v. Hilton*, 78 Mich. 150; Sedgw. Dam. (8th ed.) § 438; Suth. Dam. (3d ed.) § 67. We are of opinion that there was no error in the ruling given on this point.

The defendant contends that the jury ought not to have been instructed to add interest in making up their verdict. We think that in this Commonwealth interest *eo nomine* is not allowed in this class of cases, but that, in determining the amount of damages, the jury may consider the lapse of time since the injury, and the fact that their assessment is to be made on the day of the verdict for a loss which occurred a long time before. This may be necessary to make the compensation adequate. *Frazer v. Bigelow Carpet Co.* 141 Mass. 126. *Ainsworth v. Lakin*, 180 Mass. 397, 402. For the reasons stated in the case last cited, we do not think the defendant is shown to have been injured, so as to make a new trial necessary.

*Exceptions overruled.*

## MICHAEL BRENNAN &amp; others vs. FRANCIS J. BRENNAN.

Middlesex. November 19, 1903. — May 19, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Devise and Legacy, Construction. Real Action. Words, "Provided."*

A testatrix devised and bequeathed all the residue of her estate to one of her several heirs at law "to him and his heirs forever, provided that he shall take care of me and look after me while I live." The person named as devisee had no knowledge of the provisions of the will until after the death of the testatrix and had not performed the requirements of the clause. *Held*, that the devise was not of a fee simple, but upon a condition precedent to be performed during the lifetime of the testatrix, and that the fact that the devisee had no knowledge of the provisions of the will until after the death of the testatrix was immaterial. *Colwell v. Alger*, 5 Gray, 67, distinguished.

Where a will contained a devise of land to one of several heirs at law of the testator upon a condition precedent which had not been performed by the devisee, and the other heirs at law brought a writ of entry against the devisee, who had taken possession of the land, and prevailed on this ground, judgment was entered only for the proportional undivided portions of the land belonging to the demandants, the tenant being entitled to retain his undivided share in the land as one of the heirs at law.

MORTON, J. This is a writ of entry to recover a certain parcel of land, with the buildings thereon, situated in Cambridge, to which the demandants claim title as heirs at law of one Maria J. Day. The tenant is a brother of the demandants and is in possession and claims title to the premises as devisee under the will of Maria J. Day, which has been duly proved and allowed. The demandants and the tenant are nephews and nieces of the testatrix and her heirs at law. The sole question is whether the tenant took an estate in fee simple or upon condition. The Superior Court ruled that he took an estate in fee simple, and the case is here on exceptions by the demandants to this ruling.

The clause under which the tenant claims title is as follows: "Second. All the rest residue and remainder of my property both real, personal and mixed, I give, devise and bequeath to Francis J. Brennan to him and his heirs forever, provided that he shall take care of me and look after me while I live." The clause is well drawn and aptly describes an estate upon condi-

tion. The word "provided" imports a conditional rather than an absolute estate (*Clapp v. Wilder*, 176 Mass. 332), and the nature of the devise, and the circumstances under which it was made, manifest, we think, an intention on the part of the testatrix to make a conditional rather than an absolute gift. Her object was to make provision for her own care and comfort during the remainder of her life. Except for this object there was no apparent reason for making the tenant the recipient of her bounty to the exclusion of his brothers and sisters. It is true that he had assisted her in making arrangements for admission to the hospital, and that he had taken a mortgage to enable her to raise funds for the contemplated expenses of her sickness at the hospital. But a niece had taken care of her from the beginning of her illness down to the time of her admission to the hospital and would seem to have had as much claim upon her bounty as the tenant. There is nothing to show that the testatrix and the tenant had been on terms of intimacy, or that she had at any time displayed any particular regard for him. If the circumstances would warrant an inference that she expected thenceforward that their relations would be more intimate than they had been, there is, nevertheless, nothing to show that she trusted to this expectation and the increased care for her comfort which might be expected to result from more intimate relations, as the sole ground of her bounty. The tenant relies upon *Colwell v. Alger*, 5 Gray, 67, *Martin v. Martin*, 131 Mass. 547, and *Goff v. Britton*, 182 Mass. 293. But those cases are not applicable. In neither one of them was there as here a condition in terms. In *Colwell v. Alger*, *ubi supra*, it is expressly said of the clause relied on that "whatever else it might have meant, it was not a condition. It was not a condition in terms." Neither were the circumstances such in either one of those cases as to show that a devise upon condition was intended, and that the language should be so construed. The condition would seem to be a condition precedent rather than subsequent. It related to something to be done during the lifetime of the testatrix before the estate could vest, and there is nothing to show that it was performed by the tenant.

The fact that the tenant had no knowledge of the provisions of the will until after the death of the testatrix is immaterial,



except so far as he takes as heir at law. In regard to this it is settled "that where the devisee, on whom a condition affecting real estate is imposed, is also the heir at law of the testator, it is incumbent on any person who would take advantage of the condition, to give him notice thereof." Jarm. Wills, (6th ed.) 853. *Kenrick v. Lord Beauclerk*, 11 East, 657, 667. *Taylor v. Crisp*, 8 Ad. & El. 779. It is true that in *Colwell v. Alger*, *ubi supra*, the court seems to lay down the proposition that a condition will not be valid which without notice requires of a beneficiary the performance of acts during the lifetime of the testator, such as providing for his support. See Jarm. Wills, (6th ed.) 841, note 2, by Mr. Bigelow. But the proposition thus laid down is contrary to the weight of authority and was not necessary to the decision. *In re Hodges' Legacy*, L. R. 16 Eq. 92. *Astley v. Earl of Essex*, L. R. 18 Eq. 290. *Roundel v. Curren*, 2 Bro. C. C. 67. *Johnson v. Warren*, 74 Mich. 491. *Merrill v. Wisconsin Female College*, 74 Wis. 415.

The case is here on exceptions. But the exceptions conclude as follows: "It was agreed by the counsel of the parties, at the trial, that if the ruling of the court was right, judgment was to be entered on the verdict, and if wrong, judgment was to be entered for the demandants; damages for the rents and profits to be assessed at the rate of twenty-five dollars per month from the thirty-first day of July, 1901, or such judgment was to be entered as law and justice require." For reasons already given we think that the ruling was wrong. But since the tenant is an heir at law we do not see how an unqualified judgment for the demandants can be entered, as that would have the effect to deprive him of his interest as heir at law. But the exceptions conclude, as already observed, with the stipulation that "such judgment was to be entered as law and justice require." It is stated in the exceptions that the demandants and the tenant are brothers and sisters and the next of kin of the testatrix. It is not stated that they are all of the next of kin, though that perhaps might be implied. Assuming that the demandants and the tenant are all of the next of kin, then the demandants would be entitled to ten undivided eleventh parts of the premises and of the rents and profits, and judgment should be entered accordingly. If it should appear that we are wrong in our assumption, application

can be made to the Superior Court for a new trial, or such other relief as may be appropriate.

*Judgment for the demandants for ten undivided eleventh parts of the premises and of the rents and profits.*

*J. J. McCarthy & W. J. O'Donnell, for the demandants.*

*H. H. Winslow, H. J. Winslow & J. D. Hill, for the tenant.*

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JOHN FOTTLER, JR. vs. CHARLES W. MOSELEY.

Suffolk. November 20, 1903. — May 19, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Actionable Tort. Deceit. Damages.*

To create a liability for an unlawful act which involves a risk of injury to another, it is not necessary that the wrongdoer should contemplate the precise way in which the damage will occur or even expect that any damage will result from the act.

One, who by fraudulent representations has induced another to refrain from selling shares of a certain stock which he was about to sell, is liable for a loss to the owner of the stock from a fall in its price caused by the discovery of an embezzlement of the funds of the corporation by one of its officers, which occurs while the owner of the stock is continuing to hold it acting under the inducement of the fraudulent representations.

TORT for deceit, alleging, that, relying upon the false and fraudulent representations of the defendant, a broker, that certain sales of the stock of the Franklin Park Land Improvement Company in the Boston Stock Exchange from January 1 to March 27, 1893, were genuine transactions, the plaintiff revoked an order for the sale of certain shares of that stock held for him by the defendant, whereby the plaintiff suffered loss. Writ dated February 17, 1896.

At the first trial of the case in the Superior Court a verdict was ordered for the defendant, and the exceptions of the plaintiff were sustained by this court in a decision reported in 179 Mass. 295. At the new trial in the Superior Court before Sherman, J., it appeared that one Moody Merrill, a director and officer of the Franklin Park Land Improvement Company,

absconded late in May or early in June of 1893, and that immediately upon his departure it was discovered that he had embezzled nearly \$100,000 of the funds of that company, the result of which was that the market price of the stock immediately fell and the stock could not be sold; that the plaintiff from the time of the discovery of the defendant's alleged fraud did his best to sell his stock, but was unable to do so at more than \$3 a share, at which price he sold it after bringing this action.

The plaintiff among other requests asked the judge to rule, "That it is of no consequence so far as the defendant's liability is concerned that an outside intervening cause has been the sole or contributing cause of the decline in price to which the plaintiff's loss is due."

The judge refused this and other rulings requested by the plaintiff, and instructed the jury, among other things, as follows:

"If you find the fair market value of that stock was always above what it was fictitiously quoted, or equal to it, and that it was so on the 25th of March, 1893, and remained so and would have remained so, except for the embezzlement and absconding of Moody Merrill, then the plaintiff is not entitled to recover.

"If you find that Moody Merrill's going away did destroy the value of the stock, practically destroy its value, then the plaintiff is not entitled to recover anything.

"You may take all the evidence on this subject, the fact of what Moody Merrill did, and what effect it had upon the market value of this stock, and if that destroyed the market value, then, as I have told you, the plaintiff is not entitled to recover anything. If his going away and embezzlement did not affect the market value of this stock, then the plaintiff may recover the full value of it."

The judge submitted to the jury the following questions, which the jury answered as stated below:

"1. Did the defendant make a representation to the plaintiff on or about March 25, 1893, that the quotations in the Boston Stock Exchange of Franklin Park Land and Improvement Company stock were quotations of actual and true sales?" The jury answered "Yes."

"2. Were such quotations at or about the same sum as the quotations of actual sales and the sales at public auction?" The jury answered "Yes."

"3. What was the fair market value of said stock on or about March 25, 1893?" The jury answered "\$28.50 per share."

"4. What was the fair market value of said stock on the last day of May, or immediately prior to June, 1893, the day before Moody Merrill's absconding?" The jury answered "\$27.75 per share."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions. dict

*R. W. Nason*, for the plaintiff.

*B. L. M. Tower*, (*E. O. Hiler* with him,) for the defendant.

KNOWLTON, C. J. The parties and the court seem to have assumed that the evidence was such as to warrant a verdict for the plaintiff under the law stated at the previous decision in this case, reported in 179 Mass. 295, if the diminution in the selling price of the stock came from common causes. The defendant's contention is that the embezzlement of an officer of a corporation, being an unlawful act of a third person, should be treated as a new and independent cause of the loss, not contemplated by the defendant, for which he is not liable.

✓ To create a liability, it never is necessary that a wrongdoer should contemplate the particulars of the injury from his wrongful act, nor the precise way in which the damages will be inflicted. He need not even expect that damage will result at all, if he does that which is unlawful and which involves a risk of injury. ✓ An embezzler is criminally liable, notwithstanding that he expects to return the money appropriated after having used it. ✓ If the defendant fraudulently induced the plaintiff to refrain from selling his stock when he was about to sell it, he did him a wrong, and a natural consequence of the wrong for which he was liable was the possibility of loss from diminution in the value of the stock, from any one of numerous causes. Most, if not all, of the causes which would be likely to affect the value of the stock, would be acts of third persons, or at least conditions for which neither the plaintiff nor the defendant would be primarily responsible. Acts of the officers, honest or dishonest, in the management of the corporation, would be among the most com-

mon causes of a change in value. The defendant, if he fraudulently induced the plaintiff to keep his stock, took the risk of all such changes. The loss to the plaintiff from the fraud is as direct and proximate, if he was induced to hold his stock until an embezzlement was discovered, as if the value had been diminished by a fire which destroyed a large part of the property of the corporation, or by the unexpected bankruptcy of a debtor who owed the corporation a large sum. Neither the plaintiff nor the defendant would be presumed to have contemplated all the particulars of the risk of diminution in value for which the defendant made himself liable by his fraudulent representations. It would be unjust to the plaintiff in such a case, and impracticable, to enter upon an inquiry as to the cause of the fall in value, if the plaintiff suffered from the fall wholly by reason of the defendant's fraud. The risk of a fall, from whatever cause, is presumed to have been contemplated by the defendant when he falsely and fraudulently induced the plaintiff to retain his stock.

We do not intimate that these circumstances, as well as others, may not properly be considered in determining whether the plaintiff was acting under the inducement of the fraudulent representations in continuing to hold the stock up to the time of the discovery of the embezzlement. The false representations may or may not have ceased to operate as an inducement as to the disposition of his stock before that time. Of course there can be no recovery, except for the direct results of the fraud. But if the case is so far established that the plaintiff, immediately upon the discovery of the embezzlement, was entitled to recover on the ground that he was then holding the stock in reliance upon the fraudulent statements, and if the great diminution in value came while he was so holding it, the fact that this diminution was brought about by the embezzlement of an officer leaves the plaintiff's right no less than if it had come from an ordinary loss.

*Exceptions sustained.*

ADDIE L. WOOD, administratrix, vs. INHABITANTS OF  
WESTPORT.185 567  
d186 1481

Bristol. January 11, 1904. — May 10, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Way, Defect in highway. Negligence, Contributory. Practice, Civil, Exceptions.*

In an action against a town for the conscious suffering and death of the plaintiff's intestate caused by an alleged defect in a highway of the defendant, consisting in the want of a barrier on the top of a wall level with the highway but beyond it, over which the plaintiff's intestate drove on a very dark night, incurring injuries which resulted in his death, it appeared that the intestate was thoroughly familiar with the place of the accident, and the only direct evidence relating to due care on his part was that when asked after the accident whether his horse was getting away from him he said "No, I was driving easy but it was darker than hell." It further appeared, that the intestate on the day of the accident, which was in winter, returned from driving at half past seven in the evening and almost immediately started out again in the dark after trying in vain to get his horse into the stable, whipping his horse and swearing, and two witnesses who saw him at that time testified that he seemed to be under the influence of liquor. *Held*, that there was no evidence to submit to the jury of due care on the part of the plaintiff's intestate.

In an action against a town for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by a defect in a highway, consisting of the absence of a barrier on the top of a wall on the level of the highway but beyond it, over which the plaintiff's intestate drove in the dark, whether a witness for the defendant should be allowed to testify, that he was driving along the highway in question some time before the accident, that it was very dark and that "a team went by just like a shot", is within the discretion of the presiding judge, depending upon the question of fact whether the other circumstances of the case make this circumstance of any significance on the issue of the due care of the plaintiff's intestate.

TORT, for the conscious suffering and death of the plaintiff's intestate, alleged to have been caused by a defect in a highway of the defendant consisting in the want of a barrier on the top of a wall level with the highway but beyond it, over which the plaintiff's intestate drove in the dark on the evening of Sunday, January 26, 1902. Writ dated March 21, 1902.

At the trial in the Superior Court *Fox, J.* at the close of the evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*C. R. Cummings, (J. W. Cummings with him,)* for the plaintiff.

*A. J. Jennings & M. Morton, Jr.,* for the defendant.

KNOWLTON, C. J. This is an action to recover for an injury received by the plaintiff's intestate upon a public highway in the defendant town. The first count is founded on his conscious suffering after the injury, before his death; and the second is for his death. A verdict was ordered for the defendant and the plaintiff excepted.

The place of the accident was near a certain building belonging to the Westport Manufacturing Company, called Mill Number Two, and sometimes the Star Mill, and sometimes the Forge Mill. The Forge Road, so called, runs past this mill in a direction nearly north and south, on the easterly side of it. The mill is about two hundred and twenty feet long and forty feet wide, running north and south. The road is laid out forty feet wide, and is macadamized through the travelled part sixteen feet wide. Just before the road reaches the mill, going south, is a bridge over the stream, and just to the east of the bridge the water falls over a dam and runs under the bridge in an easterly direction. In front of the mill the macadamized road, coming southward from the bridge, curves slightly to the left, so that at the south end of the mill it runs a little to the east of south. The mill is set back to the west of the road, so that there is a distance of thirty-five feet between it and the nearest part of the macadam at the northerly end of the mill, and a distance of thirty-three feet, as given by the maker of the plan and the defendant's witnesses, at the south end of the mill, and of twenty-three feet at that point, as estimated by the plaintiff's witnesses. From the southerly front corner of the mill is a bank wall extending to the east twenty feet, towards the macadam, and from that point another wall running a little to the southeast, eleven feet, not quite parallel to the line of the road, and from this last point another wall running south fifty or sixty feet, with a railing upon it constructed by the town. There is no railing upon the first two walls, and the land in front of the mill north of the wall is on a level with the top of the wall. The land southerly and westerly of this wall is much lower, the depth being eleven feet from the top of the wall at the corner of the mill, and five feet at the easterly end of the wall. This low land to the south and west was covered by scrub trees and bushes, and was referred to as the ditch or swamp.

The accident happened on Sunday, January 26, 1902, on a very dark and somewhat rainy evening. About a quarter after nine o'clock on that evening, some persons, walking on the road a short distance south of the mill, heard a noise in the bushes below, which on investigation proved to be made by the horse and wagon of the defendant's intestate. The intestate was found lying, seriously injured, about seven feet from the wall which is along the road, and seven to eight feet from the wall which is at right angles to the road. The horse and wagon were further along in a southwest direction. There were wheel tracks south of the wall which runs from the mill to the street, beginning at about seven feet from the corner where the walls come together, and there was a space of about seven feet southerly of the first mentioned wall where there were no wheel tracks. No wheel tracks were discovered above the wall.

The theory of the plaintiff is that her husband, while driving southerly along the road, by reason of the darkness passed out of the travelled part of the way and drove over the wall which leads from the corner of the mill towards the road. The two walls on which there is no railing were built by the manufacturing company, and except for the macadam, which was laid two or three years before the accident, the premises have been in the same condition nearly thirty years. The plaintiff's intestate had been employed by the manufacturing company many years, working some of the time as a teamster about the Forge Mill and their other mills. He lived about a mile from the place of the accident, and was thoroughly familiar with the situation. There was no testimony as to how the accident happened, and this can only be inferred from the conditions subsequently discovered.

We will not consider the question whether there was negligence on the part of the defendant in the mode of constructing the road, for we are of opinion that there was no evidence of care on the part of the plaintiff's intestate. The plaintiff testified on cross-examination, "that on the Sunday of his accident, her husband first went driving about three o'clock in the afternoon and took her little boy with him; that he returned about half past seven; that he was not under the influence of liquor; that he came to the house and wanted her to go out with him;



that it was then dark ; that he drove for her to come and she didn't go ; that she did not wish to go and that her husband took the horse out of the wagon and it didn't want to go into the barn and her husband said he guessed he would give it another little drive and perhaps it would go in then ; that he tried to persuade it to go in and it would not go ; that her husband whipped the horse to try to make him go into the barn and she went out and tried to stop her husband ; that she told her husband to hitch the horse outside and let it stand ; but didn't remember what he replied ; that she didn't think she asked him to stop whipping the horse ; that there were two persons present who were as near as she was to the horse ; that one of them tried to get the horse into the barn and her husband told him to go to hell ; that she didn't know what else took place ; that she came away then ; that she didn't hear her husband say he would kill the horse or the horse would kill him ; that after the man tried to get the horse to go into the barn, and her husband had told him to go to hell, she didn't know what happened ; that she didn't stay out ; that she went into the house and didn't come out again ; that her husband drove up to the door and asked her to go to ride ; that she didn't go and she didn't see or hear more after she went in ; that she didn't say to her husband that he was too drunk ; that her husband had not been drinking ; that it was about eight o'clock ; that she told him, her husband, that she guessed she wouldn't go to ride but gave no reason for not going ; that the horse was then acting all right ; that when her husband was whipping it, the horse did nothing bad, he kind of danced around a little but wouldn't go into the stable and didn't go into the stable until they brought him back ; that it was the stable he was usually kept in." Four other witnesses, two of whom were present on the occasion of which the plaintiff testified, and another of whom rode with the defendant's intestate a while on Sunday afternoon, gave testimony which tended to show that he was under the influence of intoxicating liquor, and three of them testified directly that they noticed signs of his having been drinking. These were the only witnesses who testified to having seen him that Sunday afternoon or evening.

Two declarations of the plaintiff's intestate were in evidence.

One witness said, "I asked him if the horse was getting away from him and he says, 'No, I was driving easy but it was darker than hell.'" Another testified, "that he went into Mr. Wood's room and asked how it happened and Mr. Wood said that he had got dumped into the ditch down at the forge." It appeared that the mill was generally called the forge.

Except the single expression of the plaintiff's intestate first quoted, there is nothing but conjecture to guide us on the question whether he was exercising any care. That expression has no reference to the subject on which particular care was necessary. Taken in connection with the question to which it was an answer, it simply indicated that the horse was not running away, and that he was not going very fast. The testimony in regard to the darkness of the evening was undisputed, and this fact called for special care in driving, to avoid going out of the road. No prudent person, under such conditions, would think of driving otherwise than very slowly, taking all possible precautions to keep from getting off the travelled road. But the fact that the tracks of the wheels nearest to the wall were seven or eight feet south of it indicates that he went over pretty rapidly. The deceased knew that if he swerved to the right in passing the mill he would drive into the mill yard, and, if he kept on, would drive over the wall. If he was attentive he could not fail to know when he was passing the mill, for the sound of the wooden bridge in passing over it and the sound of the water falling over the dam would tell him that he was within a few feet of the mill. If he could not see where he was going he was bound to use care proportional to the danger. But there is nothing to show that he used any care.

If we resort to probabilities, his conduct that afternoon and evening does not indicate that he was acting prudently. His wife testified that on this winter day he went out driving at about three o'clock, taking his little boy with him, and did not return until about half past seven, and that he then almost immediately went out again on this very dark night, trying to have her go with him. In addition to what the plaintiff said, two witnesses testified to his whipping the horse and swearing when he was trying to get him into the stable. According to one of them he said, "I will get that horse tired so he will come

back so he will go in," and after that said, "he would die or the horse would die — something like that." Both these witnesses said he seemed to be under the influence of liquor.

In the absence of any evidence that he was taking precautions against driving out of the road into the mill yard and driving over the wall, the jury could not find affirmatively that he was in the exercise of due care.

The only remaining exception was to the admission of the testimony of the witness Hawes, that about seven o'clock that evening, as he was driving along on the Forge Road, not far from where the plaintiff's intestate lived, it was very dark, his "horse jumped right out and went sideways . . . and a team went by just like a shot." Whether the other circumstances of the case made this circumstance of any significance for consideration in connection with the plaintiff's claim as to her husband's due care, was a question of fact to be determined by the presiding judge in passing upon the admissibility of the testimony. Unless the person who went by was the plaintiff's intestate, it was of no consequence. We are of opinion that the probabilities, depending upon a variety of facts, were such as to leave the admission or exclusion of the evidence within the discretion of the presiding judge.

*Exceptions overruled.*

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WALTER C. LEWIS vs. ELISHA B. WORRELL.

Suffolk. January 20, 1904. — May 19, 1904.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Contract, Construction, Performance and breach. Words, "For the present."*

A contract to pay bills incurred for a certain purpose "for the present" is a promise to pay the bills, in the absence of a termination of the contract by notice, for a period of indefinite length not unreasonably long, and when the facts are not in dispute how long a time is reasonable is a question of law.

The promise of the defendant, who was interested in a certain corporation, to pay "for the present" the plaintiff's bills for advertising to be done for the corporation, was held, on the facts of this case and in the absence of any occurrence to terminate the arrangement, to have remained in force as long as fifteen months.

In an action on a contract to pay "for the present" the plaintiff's bills for advertising done for a certain corporation in which the defendant was interested, it appeared, that it was understood by the parties that the advertising was for the benefit of the corporation and ultimately should be paid for by it, although done on the credit of the defendant, that the first four monthly bills were paid by the defendant and the next five were paid by the corporation although made out to the defendant, and the defendant usually was found in the office of the corporation where its treasurer was. The defendant offered to show that the plaintiff's agent brought the bills to the treasurer and asked him to pay them. *Held*, that this evidence would not warrant a finding that the defendant's promise had come to an end and that the advertising was done on the credit of the corporation.

CONTRACT by an advertising agent for advertising the prospectus and sale of capital stock of the Sherman-Worrell Fruit Company, incorporated on October 26, 1899, for which it was alleged that the defendant agreed to pay. Writ dated March 11, 1901.

At the trial in the Superior Court before *Bell, J.*, the judge refused to make the rulings requested by the defendant, and ruled "that even upon the contract as stated by the defendant, which was in substance that the plaintiff was entitled to charge advertising bills to him for the present, the defendant had not made out a defence, because there was no competent evidence that that arrangement 'for the present' was terminated by either of the parties, but that it continued up to and including the incurring of the bill in suit, and therefore the authority to charge the bill in suit to the defendant existed, when it was charged, and that being so charged and by authority, the plaintiff was entitled to recover upon it."

He directed a verdict for the plaintiff in the sum of \$3,171.56, which was agreed upon by the parties in case the rulings above quoted were correct. The defendant alleged exceptions, raising the questions stated by the court.

*S. C. Darling & S. B. Darling*, for the defendant.

*W. D. Turner*, for the plaintiff.

KNOWLTON, C. J. This is an action to recover the amount of a bill for advertising. "The sole questions were as to credit upon which the advertising had been done and the duration of the same." There was some dispute between the plaintiff and the witness who had represented him as an agent on one side, and the defendant on the other, as to the terms of the contract. But there was no dispute that the advertising was done for the

benefit of the Sherman-Worrell Fruit Company in which the defendant was interested. The defendant's testimony as to the contract was that one Riegel, an agent of the plaintiff, came to him and solicited for the plaintiff the advertising of the company, "and that he gave him, early in November, 1899, several small orders which the plaintiff executed; that prior to the middle of that month Riegel came to him and a large order for an advertisement in the *Congregationalist* was talked over; that Riegel then said to the defendant that the plaintiff did not know the fruit company, but did know the defendant, and inquired of him if the defendant was willing to have the bills charged for the present to himself and that he assented thereto; that at an interview several days later at the plaintiff's office the plaintiff said to the defendant that the arrangement was satisfactory; and that the defendant did not again see or have any communication with the plaintiff. There were no other conversations on the subject of the credit until after the advertising in suit was done." The fruit company was organized as a corporation on October 26, 1899. The bill in suit was contracted in January, 1901, and was made up of charges for advertising procured by the plaintiff in various newspapers at different times during that month. The plaintiff procured advertising for the defendant for the benefit of the corporation, from time to time, covering the period from November, 1899, to January, 1901, the price of which, by direction of the plaintiff, was charged by his book-keeper to the defendant, and all the bills were made in the defendant's name. The judge ruled that upon the contract as stated by the defendant no defence was shown, and directed a verdict for the plaintiff.

The first question is, What is the construction of the contract as to the duration of the credit which the defendant authorized? There is no doubt that the kind of service which the plaintiff was rendering was that contemplated by the contract, and the inquiry in this part of the case is whether, under the original authority, the plaintiff might continue to charge such bills to the defendant for fourteen months, so long as there was no further communication between the parties. On the defendant's testimony the plaintiff might charge bills to him "for the present." That means, so long as there was no termination of

the contract by notice, for a period of an indefinite length, with an implied condition that it should not be unreasonably long. The question how long a time would be reasonable, when the facts are undisputed, is a question of law. We are of opinion that a contract of this kind, in reference to conditions then existing, would continue in force, in the absence of any occurrence to terminate it, as long as fifteen months.

The next question is whether the evidence relied on by the defendant would warrant a finding that the plaintiff had lost his rights in this particular. The first four bills, namely, those for November and December, 1899, and January and February, 1900, were paid by the defendant's checks. The bills for March, April, May, June and September were paid by the corporation. These bills were all made to the defendant, and it appeared that he was usually found in the office of the corporation, where the treasurer was. The treasurer testified that at the times of the payments there was no conversation with the plaintiff's agent at which the agent spoke of the company as the one liable for the bill which he presented, although the defendant offered to show that the agent brought the bills to the treasurer and asked him to pay them.

It is an important fact that it was understood between the plaintiff and the defendant that this advertising was for the benefit of the corporation, and should ultimately be paid for by it, although it was contracted for by the defendant on his own credit. While the arrangement was not technically a guaranty by the defendant of the corporation's debt, it was a loan of credit by him to the corporation to obtain that for which the corporation should pay. Under these circumstances, when the services had been rendered upon a contract with the defendant, and charged to him as the only debtor, there was nothing inconsistent in receiving from the treasurer, in the office where the defendant was accustomed to stay, payments which ultimately, to relieve the defendant, the corporation was expected to make. In our opinion this evidence would not have warranted a finding that the relations between these parties, under their contract, had come to an end, or that the plaintiff was furnishing the advertising on the credit of the corporation.

*Exceptions overruled.*

## LORETTA A. DOLAN vs. BOOTT COTTON MILLS.

Middlesex. March 1, 2, 1904. — May 19, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
& BRALEY, JJ.*Practice, Civil, Claim for jury. Rules of Court. Evidence, Collateral issues.  
Negligence, Employer's liability. Words, "Extend."*

Under Rule 18 of the Superior Court, providing that the court by special order may "extend the time" for claiming a trial by jury, it is within the discretion of the court to make an order permitting a trial by jury, although the motion to put the case on the jury list is made after the expiration of the time fixed by the rule for filing the notice of a claim for a jury.

In an action against the proprietor of a cotton mill by a bobbin girl for injuries from having her fingers caught in the uncovered gearing of a machine, it is within the discretion of the presiding judge to exclude a question by the defendant calling for a statement of what a witness knew as to gears of this kind being operated without covers in other mills.

In an action by a girl fourteen years of age, when injured, who recently had begun to work in the defendant's cotton mill as a bobbin girl, for injuries from having her fingers caught in the gearing of an uncovered spinning machine, it appeared, that the plaintiff never before had worked outside of her home and had no knowledge of machinery, that in the defendant's employ she had worked three weeks upon a machine the gearing of which was covered and it had been a part of her duty to clean the machinery, that she then was put to work under another girl upon a machine like the first except that the gearing was uncovered, that it was not safe to clean the gearing of this machine when it was in motion, and the girl under whom the plaintiff was working had been accustomed to stop the machine and clean the gearing, that after the plaintiff had worked on this machine for three days she was told to clean it without being given any instructions or warning as to the gearing, and, supposing that it was her duty to clean the gearing as well as the other parts of the machine while it was in motion, she attempted to do so, and received the injuries. *Held*, that there was evidence of the defendant's negligence in failing to give the plaintiff sufficient instructions and in giving her misleading instructions, and that there was evidence to warrant a verdict for the plaintiff.

TORT, by an infant by her next friend, for injuries received while employed in a cotton mill of the defendant at Lowell. Writ dated December 12, 1901.

The writ was returnable in the Superior Court on January 6, 1902. The action was duly entered in that court by the plaintiff, and the defendant seasonably entered its appearance by counsel and filed as answer a general denial. Neither party

filed a claim for a trial by jury. The plaintiff caused the action to be placed upon the list of actions for trial before *Wait, J.* sitting without juries at Lowell on June 23, 1902. On that day the plaintiff's counsel filed a motion in writing, requesting that the action be transferred to the list of actions for trial before a jury. The judge, finding that the plaintiff had intended to claim a jury trial, but that her counsel inadvertently and through accident had failed to do so within the prescribed time, granted the motion against the defendant's objection, and ordered the action transferred to the jury list. The defendant alleged exceptions.

The case then was tried before *Aiken, J.*, who refused to order a verdict for the defendant, and also refused to give certain instructions requested by the defendant. The jury returned a verdict for the plaintiff in the sum of \$875; and the defendant alleged exceptions.

The case was argued at the bar in March, 1904, before *Knowlton, C. J.*, *Morton, Hammond, & Braley, JJ.*, and afterwards was submitted on briefs to all the justices except *Loring, J.*

*F. E. Dunbar*, (*G. H. Spalding* with him,) for the defendant.

*F. W. Qua*, for the plaintiff.

KNOWLTON, C. J. The question raised by the first bill of exceptions is whether it was in the power of the court, under the R. L. c. 173, § 56, and Rule 18 of the Superior Court, after the expiration of ten days from the filing of the answer, to make a special order permitting the plaintiff to put the case on the list of cases to be tried by a jury. That part of the statute which is applicable allows the entry of an action upon this list "within such time after the parties are at issue as the court may by general or special order direct." The general order of the Superior Court is found in Rule 18 of the common law rules, which provides that notice of a desire for a trial by jury shall be filed "not later than ten days after the time allowed for filing the answer, or plea, . . . unless the court by special order shall extend the time." It is plain that the statute contemplates the making of a general order by the court, with power to make a special order in any particular case, as well after the expiration of the time prescribed by the general order as before it. Indeed, if the time prescribed by the general order had not expired, there



would ordinarily be no need of a special order. Unless the court by this rule has limited the power given it by the statute, the special order referred to in the rule must be held to include authority to extend the time after its expiration as well as before. While there is force in the argument that the word "extend", used in reference to a period of time, seems to imply the existence of an unexpired portion of the period, there are other opposing considerations applicable to this case which we deem of more weight. In the first place, the court would hardly be expected, by a rule in regard to procedure, to deprive itself of power conferred by the statute to give relief from accidents, and to permit the correction of mistakes. Whether it would have constitutional authority to do so, in a matter relating to the right of trial by jury, is a question which we need not now consider. Under this statute, the rule of the court at that time being expressed in language different from the present rule, this court said, in *Bailey v. Joy*, 132 Mass. 356, that it was within the discretion of the court after the expiration of ten days to refuse a motion for a trial by jury, and plainly implied that it was within the power of the court to allow it. The case of *Cleverly v. O'Connell*, 156 Mass. 88, arose when Rule 22 of the Superior Court, of the edition of 1886, was in force, which ends with the words, "unless the court shall by special order restrict or extend the time." These words are certainly as favorable to the defendant's contention as those of the present rule. In that case Chief Justice Field said in the opinion, "After the time provided for filing such a notice by the general rule of the court has elapsed, it is in the discretion of the court . . . to grant or deny to any party the right to file the notice required by the statute."

This language was not necessary to the decision, and may be regarded as a dictum. But the case of *Haynes v. Saunders*, 11 Cush. 537, is a direct adjudication, involving the meaning of the word "extend" in a statute, which in this particular is almost identical with the rule of court before us. It was held that the court had power to allow the filing of an affidavit of merits upon a motion made after the expiration of the prescribed time, the statute giving express authority to extend the time.

The statute in regard to the filing of exceptions and giving of notice to counsel, R. L. c. 173, § 106, is materially different. Its

intended effect is that, on the expiration of the prescribed time, the parties shall know definitely whether the decision excepted to stands, or whether it is subject to revision by a higher court. *Barstow v. Marsh*, 4 Gray, 165. *Commonwealth v. Greenlaw*, 119 Mass. 208. *Conway v. Callahan*, 121 Mass. 165. *Purcell v. Boston, Halifax, & Prince Edward Island Steamship Line*, 151 Mass. 158. We are of opinion that it was within the discretion of the court to make the order permitting a trial by jury.

The exceptions taken at the trial present, first, a question of evidence. The plaintiff was injured by having her fingers caught in the gearing of a fly frame, a kind of spinning machine in the defendant's cotton mill. This gearing was uncovered. One Rice, a witness called by the defendant, testified that he had been an overseer of carding in the defendant's mills for nineteen years. This question was put to him by the defendant: "I will ask you, Mr. Rice, if you know, what the fact is about gears of this kind in different mills being operated without these covers." On objection of the plaintiff, and subject to the defendant's exception, the witness was not permitted to answer.

On the question whether the use of a particular machine or appliance by a defendant is negligent, a jury may properly consider all facts that throw light upon it. The possibility and the ease or difficulty of procuring something different which is safer and better are important facts bearing upon it. That something safer has been invented and is in common use is ordinarily a fact of considerable significance. Evidence of this kind is often received in such cases. *Wheeler v. Wason Manuf. Co.* 135 Mass. 294. *Myers v. Hudson Iron Co.* 150 Mass. 125. *Veginan v. Morse*, 160 Mass. 143. *McCarthy v. Boston Duck Co.* 165 Mass. 165. *McMahon v. McHale*, 174 Mass. 320, 325. On the other hand, there is danger that the introduction of such evidence will lead to collateral inquiries which will becloud the main issue. For this reason much is properly left to the discretion of the presiding judge in determining when it is best to receive such evidence. *Veginan v. Morse*, *ubi supra*. *McCarthy v. Boston Duck Co.* 165 Mass. 165, 169. *Ford v. Mount Tom Sulphite Pulp Co.* 172 Mass. 544, 546. Especially is this so if the question relates to the methods of particular persons or in particular places. *McCarthy v. Boston Duck Co.* *ubi supra*. It is also to be noted

that the methods adopted by certain persons or in certain places, or even the common usage of a small class of persons engaged in a particular business, is not to be made a standard by which the defendant's conduct is to be judged in reference to care. *Veginnan v. Morse*, 160 Mass. 143, 148. *Ford v. Mount Tom Sulphite Pulp Co.* 172 Mass. 544, 546. In *Hill v. Winsor*, 118 Mass. 251, 259, Mr. Justice Colt said in the opinion, "There is no rule of law which exempts one from the consequences of his negligent conduct upon proof that he proceeded in the usual manner and took the usual course pursued by parties similarly situated, although he was without notice that he could not safely do so. The defendants cannot protect themselves by proving the careless practices of others," etc. It is conceivable that the persons engaged in a certain business, comprising but a small class working in a narrow range, may have adopted generally a method which ordinary persons, of different callings and with a broader view, would generally condemn as careless. Such a method is not the standard by which one is to be judged, although, if it can easily be proved, it is competent evidence for a jury in some kinds of cases on the question whether he exercised due care.

In actions against towns for accidents upon highways, and in other similar cases, such evidence is excluded, chiefly because it relates to methods of dealing with external conditions which differ greatly in different cases, and which cannot be understood without opening unprofitable collateral inquiries. Perhaps another reason for its exclusion in the early cases was that, under the law prior to the St. 1877, c. 234, the liability of cities and towns depended upon a failure to maintain the way at a required standard of safety, rather than upon a failure to use reasonable care and diligence. *Hinckley v. Barnstable*, 109 Mass. 126. *Bailey v. New Haven & Northampton Co.* 107 Mass. 496. *Craven v. Mayers*, 165 Mass. 271. In the present case it appeared as an undisputed fact that upon different machines this gearing was sometimes covered and sometimes uncovered, and that the defendant had other machines of the same kind on which it was covered. So far as appears, an answer to the question would have added nothing to the facts which were not in controversy. At all events, there is nothing to show that the knowledge of the witness extended further than his observation of the practice in

certain particular mills, and the ruling falls within the decision in *McCarthy v. Boston Duck Co.* 165 Mass. 165, 169, and other similar cases, in which the exclusion of such questions was held to be within the discretion of the presiding judge.

There was evidence that the defendant was negligent in failing to give the plaintiff sufficient instructions and in giving her misleading instructions. The plaintiff was a girl fourteen years of age, who had just begun to work in the defendant's mill as a bobbin girl. She had never before worked outside of her home, and she had no knowledge of machinery. She worked three weeks upon a machine, and it had been a part of her duty to clean the machine. The gearing on this machine was covered. She was then taken to another room and put to work under another girl, upon a machine like the first, except that the part of the gearing by which she was injured was left uncovered. There was evidence that she was told to clean this machine, without being given any instructions or warning as to this part of the gearing. After she had worked upon it three days, the accident happened. The evidence tended to show that it was not safe to clean this part of the gearing on this machine when it was in motion, and that the girl in charge of it, under whom the plaintiff was working, had been accustomed to stop the machine and clean this part herself. The plaintiff's testimony tended to show that, under the directions given her, she supposed and was warranted in supposing that it was her duty to clean this gearing as well as other parts of the machine while it was in motion. The judge rightly declined to rule that there was no evidence to warrant a verdict for the plaintiff. The other requests for instructions, so far as they correctly state propositions of law, were sufficiently covered by the charge.

*Exceptions overruled.*

## INHABITANTS OF HUDSON vs. EDWARD P. MILES &amp; others.

Middlesex. March 2, 8, 1904. — May 19, 1904.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

*Surety. Bond. Municipal Corporations.*

It is no defence to an action by a town against individual sureties on the bond of a defaulting collector of taxes, that before the defendants signed the bond as sureties officers of surety companies had stated to the chairman of the selectmen of the plaintiff that they had investigated the collector's character and habits, that there was a woman mixed up in the case, and that on account of his bad reputation they had refused to go on his bond giving as their ostensible reason that they did not wish to go on collectors' bonds, and that the chairman "informally reported" to the other selectmen and to one of the defendants what he was told, no disclosure being made to the other defendants.

The sureties on the bond of a collector of taxes given for the faithful discharge of his duties during his whole term are liable for sums received during the portion of his term before the bond was given.

If the bond of a collector of taxes of a town with two sureties has been approved by the selectmen of the town under the requirements of R. L. c. 25, § 77, c. 12, § 67, another bond with twenty sureties given later by the same collector for the same period and accepted by the town is good at common law even if the selectmen have exhausted their statutory power of approval.

Cases cited, deciding that an instrument under seal needs no consideration, although the point that the bond in this case was without consideration as to the sureties was not open, not having been taken at the trial.

In an action by a town against the sureties on the bond of a defaulting collector of taxes, the defendants cannot introduce evidence of statements made to them by the principal to induce them to sign as sureties which never were brought to the knowledge of the plaintiff or its selectmen.

In an action by a town against twenty sureties on the bond of a defaulting collector of taxes, who previously had filed a bond with two sureties for the same period, it is immaterial whether the new bond was intended by the principal and the sureties as an additional bond or as a substitute for the former bond, or whether the sureties were ignorant of the existence of the former bond, if the delivery of the new bond was absolute and was not made conditional on any of these things.

Negligence on the part of the auditors, selectmen and treasurer of a town in failing to discover the misconduct of a defaulting collector of taxes is no defence to an action by the town against the sureties on the collector's bond.

In an action by a town against the sureties on the bond of a defaulting collector of taxes, the defendants are liable for any deficiency in the funds to be accounted for by the collector during the term covered by the bond arising from his application of the funds in payment of previous deficiencies, if the payments were received by the town in good faith.

LOBING, J. This is an action on a bond dated July 1, 1899, given by a collector and twenty sureties. The bond recites that the defendant Miles has been elected collector of taxes of the plaintiff town for the current year, has accepted and been duly sworn, and is conditioned that he "shall, as collector of taxes as aforesaid, faithfully collect, account for and pay over all moneys which he shall be legally required to collect as collector of taxes as aforesaid and shall faithfully discharge all the other duties of said office during the time he shall hold said office under said election." The case came on for trial before a jury. Under the direction of the presiding judge a verdict was entered for the plaintiff. The case is here on a report which provides that if the rulings made at the trial were right, judgment is to be entered on the verdict and execution is to issue for \$9,800.10, with interest from August 24, 1901, with costs.

We are of opinion that the rulings made at the trial were right.

It appeared in evidence that the defendant Miles, the principal named in the bond now in suit, was elected collector of taxes for the years from 1893 to 1900 inclusive. Before 1896 he had given bond with individual sureties, and in 1897 and 1898 a surety company went surety for him on his bond. After Miles's election in March, 1899, he was asked by the selectmen to furnish his bond. They learned in that connection that he intended to furnish a surety company as surety, but that he had difficulty in procuring one to go on his bond. In July the assessors were ready to commit their warrant to the collector. On July 18 Miles gave a bond with the defendant Apsley and the defendant Blake as sureties. This was given in pursuance of a letter written by Apsley in which he stated that Miles was expecting to give a bond with a surety company as surety, that there was a delay in procuring the surety company, and that he would be liable until such a bond was given. The bond given July 18 in pursuance of this letter was in the same form as the bond sued on. This bond was approved by the selectmen on July 18, and the warrant for the taxes was forthwith committed to Miles by the assessors. After this bond was given, Miles procured the defendants other than himself to sign a paper agreeing to sign his bond as collector "if twenty names are secured."

Twenty names were secured, and the bond sued on was executed by the twenty as sureties and was approved by the selectmen September 22, 1899. Miles, together with the defendants Apsley and Blake, understood when they executed the bond on July 18 that as soon as possible a bond with a surety company as surety was to be procured and "filed in place of" the one executed by them and approved by the selectmen on July 18, and that bond, by vote of the selectmen on February 6, 1900, was delivered to the defendant Apsley.

In January, 1901, it was learned by officials of the town that the defendant Miles had been guilty of wrongdoing, and he was arrested on January 28 of that year.

All money collected and paid over by Miles while collector for 1899 was deposited by him in a bank to the credit of the treasurer of the town. When he deposited money he made a deposit slip in duplicate; one was returned to him after being verified by the cashier of the bank and the other was retained by the bank. The bank made a memorandum of the amount but not of the items of the deposit, and sent it to the town treasurer. On the deposit slip was stated the year to which the deposit was to be applied, and the names of the drawers of the checks deposited. Miles's method was to withhold money or checks collected by him, and to cover deficits so created with money collected upon the levy of a later year. His failure to turn over money collected extended throughout the whole period from 1894, and the total of his deficits increased steadily.

It was shown that before July, 1899, the chairman of the selectmen called on the officers of the surety company which had gone surety on Miles's bond for the years 1897 and 1898, and "informally reported to the other selectmen and the defendant Apsley what he was told as their reasons for declining further to act as surety, or to become surety." The defendants then offered to show "that the surety companies stated to Mr. Tower, the chairman, that they had investigated Mr. Miles's character and habits, that there was a woman mixed up in the case, and on account of his bad reputation they refused to go on his bond, giving ostensibly that they did not wish to go on collectors' bonds, but the real reason was as given to Mr. Tower." The first exception is to the exclusion of this evidence.

To make this admissible the defendants must make out that this information which came to the selectmen by its being "informally reported" to them by the chairman, was information coming to persons whose knowledge is the knowledge of the plaintiff town, (see *Lee v. Munroe*, 7 Cranch, 366, *Hawkins v. United States*, 96 U. S. 689, 691,) and information which came to them in such a way that the town was chargeable with it, as to which see *Sooy v. State*, 12 Vroom, 394, 400.

However these questions would be decided, we have found no case which goes so far as we are asked to go in the case at bar. It may be taken to be settled that if it is known to the obligee of a bond that the principal in the past has been guilty of irregularities in respect to the duties for the faithful performance of which in the future the bond is given, a failure of such an obligee to disclose that fact is a defence to the liability of the surety. *Phillips v. Fozall*, L. R. 7 Q. B. 666. *Sooy v. State*, 10 Vroom, 135. The ground of this defence in some cases has been stated to be that fraud is made out, *Lee v. Jones*, 17 C. B. (N. S.) 482, 507, and in other cases that there is a concealment of facts which the surety has a right to know. *Railton v. Mathews*, 10 Cl. & F. 934, 943. But whichever is the ground of the defence it does not extend in our opinion to a case where the information which has come to the obligee of a bond of a collector of taxes is no more definite than "that there was a woman mixed up in the case," and especially when the information which has come to the obligee does not rise higher than hearsay or rumors, as to which see *State v. Atherton*, 40 Mo. 209, 215, 217.

Evidence that \$421.67 of the sum found due to the plaintiff was collected between July 18 and September 22 was rightly excluded. The bond is in terms given for the faithful discharge by the collector of his duties for the whole term. In such a case the sureties are liable for sums received during the term in question, although received before the bond was given. *Hatch v. Attleborough*, 97 Mass. 533. See *McIntire v. Linehan*, 178 Mass. 263.

The third exception is to the refusal of the presiding judge to rule "that the power of the selectmen to accept and approve a bond of the collector for the year 1899 was exhausted" by the approval of bond with the defendants Apsley and Blake as sure-



ties, and "that the bond sued upon was invalid and inoperative and to direct a verdict for said defendants." The defendants Apsley and Blake did not join in the request for this ruling. It is true, as the defendants contend, that until the bond of the collector was approved by the selectmen under R. L. c. 25, § 77, the tax list and warrant could not be transmitted to the collector, R. L. c. 12, § 67, but it does not follow that after that had been done a bond could not be given at common law. We are of opinion that the bond was good as a common law bond. See in this connection *Smith v. Crooker*, 5 Mass. 538; *Wendell v. Fleming*, 8 Gray, 613; *Sooy v. State*, 12 Vroom, 394; *Estate of Ramsay v. People*, 197 Ill. 572; *Morrell v. Sylvester*, 1 Greenl. 248.

An argument has been made by the defendants that the bond is without consideration. But that point was not taken at the trial, and is not open here. In disposing of the argument on this ground we do not mean to intimate that there would have been anything in the point had it been taken, as to which see *Page v. Trufant*, 2 Mass. 159; *Mather v. Corliss*, 103 Mass. 568, 571; *Comstock v. Son*, 154 Mass. 389; *Krell v. Codman*, 154 Mass. 454; *Roth v. Adams*, ante, 341; *Graham v. Middleby*, ante, 349; *Sooy v. State*, 12 Vroom, 394, affirming *Sooy v. State*, 9 Vroom, 324.

The next exception is to the exclusion of evidence offered by the defendants Keith, Hall, Knight and Jennison, as to what was said by Miles when he asked them to agree to execute the bond as one of the twenty sureties. The defendants Keith and Jennison each offered to show that he was told that the bond he signed was to take the place of a temporary bond while in fact the bond executed by Blake and Apsley was not a temporary bond. Hall offered to show that Miles told him that he had no bond and it was necessary for him to have one. Knight offered to show that Miles said that he had to have a personal bond because the surety companies had given up going as surety on bonds of collectors. The defendant Trow offered to show that Miles told him nothing about the first bond executed by Apsley and Blake, and Hall and Knight offered to show that they were ignorant of the existence of that bond.

No evidence was offered connecting these statements with the

plaintiff or to show that they ever were brought to the knowledge of the plaintiff or of the selectmen. The obligee's right to hold the surety does not depend on representations made by the principal on his own behalf without knowledge of the obligee.

This bond was executed and delivered, and it is immaterial whether it was intended by the principal as an additional bond or as a substitute for the former bond, or was given in ignorance of the fact that there was another bond or whether some of the twenty-one defendants had one of these three intentions and some another. The delivery of the bond was absolute and was not made conditional on any one of these things. This exception must be overruled.

"Evidence was offered tending to show negligence on the part of the auditors, selectmen and treasurer of the town, since 1894, when Miles' peculations began, to January, 1901, when they were discovered, in failing to make investigations which would have disclosed his misconduct and insisting on his keeping certain books they furnished." Apart from the question whether the neglect of the auditors, selectmen or treasurer is the neglect of the plaintiff, (see *Winthrop v. Soule*, 175 Mass. 400,) their neglect is not a defence if it is the neglect of the plaintiff. *Amherst Bank v. Root*, 2 Met. 522. *Watertown Ins. Co. v. Simmons*, 131 Mass. 85. *Winthrop v. Soule*, 175 Mass. 400. *Welch v. Walsh*, 177 Mass. 555.

It appeared that the amount collected by Miles was \$65,813.86; the amount "deposited to the credit of the town or paid to the treasurer as collected upon his warrant for 1899 was \$56,366.28," a difference of \$9,447.58; in addition he failed to collect \$352.52, making the sum of \$9,800.10, for which by the terms of the report execution is to issue if the rulings made at the trial were right. Of the \$9,447.58 Miles "received \$2,754.77 in checks, which he deposited as received but did not credit them to taxpayers from whom he received them upon his list for 1899." The defendants "claimed that inasmuch as the plaintiff actually received these sums, they were entitled to credit for them in reduction of the balance found due the plaintiff by the auditor." It appeared that the "total amount deposited to the credit of the plaintiff by Miles upon all his tax lists during the period between July 18, 1899, and January 28, 1901, the date of his

arrest, was \$78,654.27." This ruling was refused and an exception taken.

It was decided in *Colerain v. Bell*, 9 Met. 499, that, where a collector of taxes who held the office for two terms with different sureties on his official bond applied sums received from taxes during the second term to the payment of taxes due during the first term which had been collected by him and had not been paid to the town, the sureties on the bond for the second term were liable if the sums paid were received in good faith by the town. That case was followed in *Sandwich v. Fish*, 2 Gray, 298, and *Egremont v. Benjamin*, 125 Mass. 15. See also *Sooy v. State*, 12 Vroom, 394, on appeal from *State v. Sooy*, 10 Vroom, 539, in which *Egremont v. Benjamin*, *ubi supra*, is cited and followed. That is decisive of this exception. It was stated in argument by counsel for the plaintiff that the checks for \$2,754.77 were used to make good deficits caused by a failure to pay taxes collected during the year in question. Whether that is so or not does not appear from the report of the presiding judge. If we assume in favor of the defendants that it was not, the point is concluded by the authorities cited above.

The trial of this case is anomalous in that the court has undertaken to dispose at one sitting of the two questions which ordinarily are taken up separately, namely, whether there has been a breach of the bond, and, when that has been established, for what amount execution is to issue under R. L. c. 177, §§ 9, 10.

The entry must be

*Judgment on the verdict. Execution to issue for \$9,800.10, with interest from August 24, 1901, and costs.*

*R. E. Joslin, (S. W. Mendum with him,) for the plaintiff.*

*L. C. Southard, for the defendants.*

185	589
f187	*260
187	261

AMERICAN UNITARIAN ASSOCIATION vs. LAURENCE MINOT  
& another, trustees, & others.

Suffolk. March 4, 1904. — May 19, 1904.

Present: KNOWLTON, C. J., HAMMOND, LORING, & BRALEY, JJ.

*Practice, Civil, Report. Equitable Restrictions. Deed. Words, "House to be built."*

A petition under R. L. c. 182, §§ 11-14, to determine the validity, nature and extent of alleged restrictions on land is a proceeding at law, and a decree therein must be ordered by a judge of the Superior Court before he can report the case for determination by this court.

In case of doubt a clause creating an equitable restriction on land is to be construed against the grantor and to favor freedom from restriction.

The duration of an equitable restriction on land is a question of the intention of the parties to be arrived at by construing the words of the deed in the light of the attending circumstances.

A provision in a deed of one of six city building lots on which the erection of a uniform block of six private dwelling houses is anticipated, that "the front line of the house to be built on the lot" shall be set back from the line of the street as marked and laid down on a certain plan, creates a restriction relating only to the house to be built at that time.

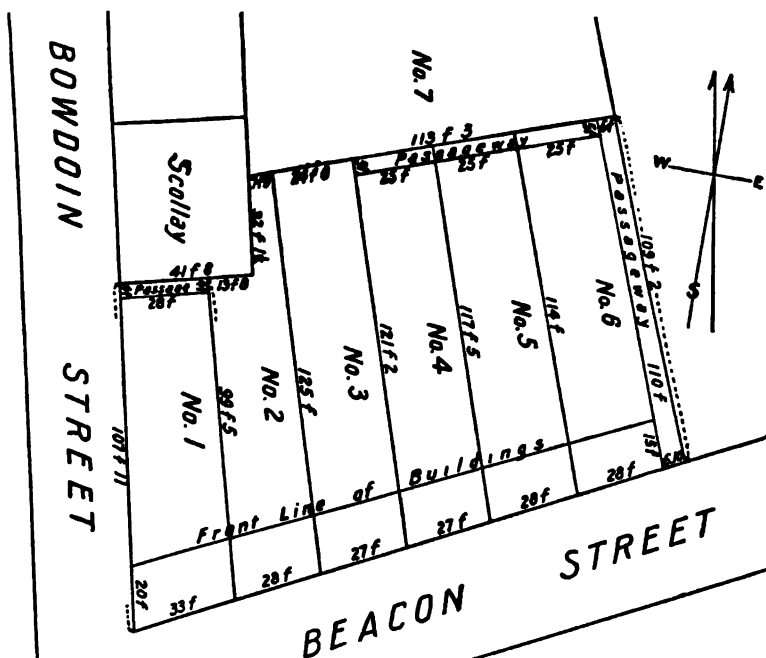
If a deed of a city building lot creates a restriction of set back relating only to the house to be built there at that time, and refers to a plan on which a line extending across this and other lots is marked "Front line of buildings", the more general words on the plan cannot extend the restriction beyond its definition in the deed.

Whether on a petition under R. L. c. 182, §§ 11-14, to determine the validity, nature and extent of an alleged restriction on land, the court can take into consideration the fact that changed circumstances have made the enforcement of the restriction inequitable, as would be done in a suit in equity to enforce the restriction, *quære*.

PETITION, filed July 24, 1903, to determine the validity, nature and extent of certain alleged restrictions on the petitioner's land at the corner of Beacon and Bowdoin Streets in Boston.

The case was entered on the equity docket of the Superior Court and came on to be heard before *Hardy, J.*, upon the pleadings and an agreed statement of facts. Following the form of reservation in regard to which no question had been raised in *Boston Baptist Social Union v. Boston University*, 183 Mass. 202, the judge at the request of the parties reserved the case for determination by this court. The case first was argued in this

court on January 22, 1904. At the argument, the counsel for the petitioner pointed out that the petition was a proceeding at law, citing *Crocker v. Cotting*, 173 Mass. 68, 69, 181 Mass. 146, 153. By a rescript issued on January 25, 1904, the reservation was discharged and the case was remitted to the Superior Court



in order that a decree might be made by the trial judge. In the Superior Court the case was again presented to *Hardy, J.*, who made a decree declaring that the restrictions in question were intended to apply to all buildings which at any time might be erected on the lots in question by the original grantees or by their successors in title, and that the right to enforce these restrictions was appurtenant to each of the six lots on Beacon Street mentioned in the opinion and shown on the plan printed in this report. At the request of the parties the judge reported the case for determination by this court. If the decree was right, it was to be entered; otherwise such modification was to be made therein or such other order was to be made as law and justice might require. Coming again before this court the case was argued on March 4, 1904.

On the foregoing page is a reduced copy of a part of the plan of Alexander Wadsworth, surveyor, dated October 13, 1843, which is referred to in the opinion.

*H. W. Putnam*, for the petitioner.

*H. M. Davis*, for the respondents Minot and Bowditch, trustees.

*A. Sanford & G. E. Smith*, for the respondents McAleer, submitted a brief.

LORING, J. This is a petition under St. 1889, c. 442, now R. L. c. 182, § 11, in which the petitioner seeks to have it decided that the equitable restriction is no longer in force which was created by two deeds under which it claims title executed and recorded in 1843. The land of which the parcel now owned by the petitioner was then a part was divided at that time into building lots by the owners of it, who caused the plan of it, dated October 13, 1843, to be made and recorded. The land is there divided into six lots, with a frontage on Beacon Street varying from twenty-seven to thirty-three feet. There is a line on the plan entitled "Front line of buildings," which is fifteen feet back from the northerly line of Beacon Street at its easterly end and twenty feet back from that northerly line at its westerly end. All six lots were conveyed by deeds dated October 27, 1843, and acknowledged, two on November 1, one on November 9, one on November 10, one on November 13, and one on November 16. The deeds under which the plaintiff claims title were acknowledged on November 9 and 13. In the deed of lot 2 is this clause: "But this conveyance is with the restriction that the front line of the house to be built on the lot thereby granted shall be set back from the northerly line of Beacon street as marked and layed down on said plan, except that said Preston shall elect to build a house with a swelled front and in such case he may place the extreme swell three feet out from said front line, and the partition walls above the cellar floor shall be of the thickness of one brick and a half, unless the owners of the adjoining lots shall otherwise agree with said Preston and the walls shall be erected on the dividing line of the lots, one half on each lot, and if the owner of either lot shall refuse to build on the request of the owner of the adjacent lot, the latter shall have the right to erect the wall and the owner shall pay

one half part of the reasonable cost thereof, or of such portion of the same as he shall at any time thereafter use. The above granted premises being the same which are delineated on a plan by Alexander Wadsworth as lot No. 2, which plan is recorded herewith in Suffolk Registry." In the deed of each of the other lots, except lot 1, is the same clause excepting only the number of the lot inserted in the final sentence as the number of the lot conveyed. There is a similar clause in the deed of lot 1. In that clause it is provided that "the house to be built on the lot hereby granted shall be set back twenty feet from the northerly line of Beacon street as marked on the plan herein-after mentioned."

The petitioner is the owner by mesne conveyance of the whole of lot 1, and all of lot 2 except the northerly jog and one foot on the east which were conveyed to the owner of lot 3 in November, 1848.

It appears that six private four story brick dwelling houses, each with a swell front complying to the restrictions, were erected on the several lots immediately after the delivery of the deeds, and were occupied as residences until 1884 in case of lots 1 and 2, when those lots (with the negligible exceptions already stated) were sold to the petitioner, and in case of lots 3, 4 and 5 until they "were removed recently and the Hotel Bellevue, an eleven (11) story steel frame structure, [was] erected in their place and upon the adjacent part of lot 7, while that on lot six (6) has been lately increased two stories in height and otherwise altered to adapt it to use in connection with said hotel."

The petitioner concedes that the two lots now owned by it were originally subject to an equitable restriction imposed for the benefit of the other four lots, but it contends that this restriction should be construed as the restrictions there in question were construed in *Hubbell v. Warren*, 8 Allen, 173, *Hamlen v. Keith*, 171 Mass. 77, and *Boston Baptist Social Union v. Boston University*, 183 Mass. 202, namely, to be restrictions confined to the first building erected, and which expired when that building was torn down.

The two dwelling houses erected on the two lots now owned by the petitioner were torn down, as we have said, in 1884, and

if the petitioner's contention is correct this restriction on these two lots came to an end at that time.

In each of the three cases already mentioned as cases relied on by the petitioner there was some one of several considerations none of which are in the case at bar.

In *Hubbell v. Warren*, the agreement relied on was not found in the deed of conveyance but was in the form of a collateral oral agreement. What the exact terms of that agreement were did not appear.

In *Hamlen v. Keith*, there was no equitable restriction providing in terms for a building line. To make out such an equitable restriction, the plaintiff relied on a common law condition imposed in 1795, that "all buildings to be erected on the lands sold by virtue of this vote shall be regular and uniform, and of brick or stone, and covered with slate or tile, or some materials that will resist fire." The conclusion of the court is summed up in these words: "We are of opinion that the words are given sufficient force if they are confined at most, so far as the present question is concerned, to the original construction of the buildings first erected,—those which it was expected would be erected and which were erected in fact soon after the town had made its sales. It seems to us that it would be going too far to interpret the words as binding the owner of every lot into which the land might be cut up to adhere for all time, and under whatever change of conditions and circumstances, to a building line other than that of the conveyances, determined by the accident of what the first builder chose to do."

In *Boston Baptist Social Union v. Boston University*, the grantor of the deed containing the restriction (which the defendant in that case contended it was entitled to enforce) at the date of that conveyance did not own the adjoining land afterwards acquired by the defendant. The court passed by that difficulty of the defendant in making out its right (a difficulty like that dealt with in the subsequent case of *Hazen v. Mathews*, 184 Mass. 388,) and assumed that it was not of itself fatal. But that fact constituted an important consideration in construing the words "the house to be erected," which were the words of that agreement as they are of the agreement now under consideration.



On the other hand the principal cases relied on by the defendants in the case at bar do not go so far as they ask us to go here. They are *Keening v. Ayling*, 126 Mass. 404, *Sanborn v. Rice*, 129 Mass. 387, *Ayling v. Kramer*, 133 Mass. 12, *Kramer v. Carter*, 136 Mass. 504, and *Hamlen v. Werner*, 144 Mass. 396. All these cases contain the same clause relied on as establishing a restriction, and that clause is in the form of "conditions" which were held to be restrictions and which were as follows: (1) That the taxes should be paid by the grantee; (2) that "the front line of the building which may be erected" should be set back fifteen feet; (3) that "the building which may be erected" should cover the whole lot; (4) that "no dwelling house or other building except the necessary outbuildings shall be" placed on the rear of the lot; and (5) that no building which may be erected shall be less than three stories in height nor have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling house during the term of twenty years.

In *Kramer v. Carter*, 136 Mass. 504, 506, W. Allen, J. stated that "in that deed were certain conditions which operated as restrictions, and created a perpetual servitude upon the land in favor of adjoining lands, one of which was that no building should ever be erected upon a certain part of the land." It is not necessary to inquire whether that referred to the set back in front or to the restriction forbidding any buildings in the rear of the lot. It is evident that the terms of the "conditions" creating the restrictions there in question, when taken as a whole, are not sufficiently near those now before us to make that expression of opinion of value here. It should be added that in *Sanborn v. Rice*, 129 Mass. 387, and *Hamlen v. Werner*, 144 Mass. 396, the things complained of were additions to the original buildings. For that reason the question whether the restrictions applied to all buildings whenever erected or were confined to the building first erected did not arise, and there is no expression of the opinion of the court upon it.

The question in *Jeffries v. Jeffries*, 117 Mass. 184, 189, also relied on by the defendants, was not as to the duration of the restriction. The word "never" in the clause creating the restriction disposed of that. The question in that case was

whether the clause applied to the roof of any and all buildings or was to be held to be confined to the roof of a stable. The clause was this: "provided that the roof of the aforesaid stable shall never be raised more than thirteen feet above Olive Street." It was held to apply to the roof of any and all buildings thereafter erected on the lot then covered by the stable and on this ground: "As a restriction, it must be construed beneficially, according to the apparent purpose of protection or advantage to the several estates, which it was intended to secure or promote. Its leading and most obvious purpose was to prevent the intercepting of light, air and prospect, by a building or roof raised beyond the height named. So far as that purpose was concerned, it would make no difference for what the building should be occupied." For a case where the same consideration determined the construction, see *Chase v. Walker*, 167 Mass. 293.

Finally, it has been laid down by this court that in case of doubt a clause creating an equitable restriction is to be construed against the grantor and in favor of the grantee's right not to have his land restricted. *Stone v. Pillsbury*, 167 Mass. 332. *Welsh, petitioner*, 175 Mass. 68. *Boston Baptist Social Union v. Boston University*, 183 Mass. 202.

The duration of an equitable restriction is a question of the intention of the parties, to be determined by construing the words used in the light of attending circumstances.

The line which is described in the deed is characterized on the plan referred to in the deed as "Front line of buildings." Had the clause in the deed creating the restriction gone no farther than to adopt that characterization, the case would be a very different one from that now before us, and might well be held to apply to all buildings thereafter erected on the land, having regard to the consideration which was decisive in *Jeffries v. Jeffries*, and in *Chase v. Walker*.

But in determining what the extent of the restriction is, the language of the clause creating it must be decisive if (as is the case here) it undertakes to define in terms its extent. In the case at bar the clause provides "that the front line of the house to be built on the lot thereby granted shall be set back from the northerly line of Beacon street as marked and layed down on said plan." These are the exact words of the clause in

the deeds of lots 2, 3, 4, 5 and 6. The clause in the deed of lot 1 is the same except that the words "twenty feet" are inserted after the words "set back," a difference of no consequence in this connection.

The conclusion cannot be avoided that, as matter of construction of this clause, the restriction created by it does not go beyond "the house to be built" at that time. If the plan imports more than the deed, the provisions of the clause of the deed creating the restriction in which the parties have undertaken to define the extent of it must prevail over the characterization of the line on the plan referred to in the deed. The habendum clause by which the estate conveyed "subject to the restrictions" aforesaid is limited to the heirs and assigns of the grantees finds full scope in the possibility of the buildings lasting beyond the lives of the several grantees and of the land being built upon by persons claiming under the grantees and not by the grantees themselves.

It may well be assumed that the restrictions in question were assented to in anticipation of the erection of the uniform block of six four story private dwelling houses which were erected "immediately after" the deeds of the six lots were given, and that all the parties thought it to be the wisest course to limit the restrictions to the life of those houses which were not likely to be torn down for many years and which in fact stood, those on lots 1 and 2 for forty years, and those on 3, 4, and 5 for more than forty years, while that on lot 6 is still in existence. See in this connection *Boston Baptist Social Union v. Boston University*, 183 Mass. 202, 204, 205. The conclusion reached is in general accord with the rule of construction since adopted by the Legislature by St. 1887, c. 418, now R. L. c. 134, § 20.

There are cases where covenants in terms somewhat like the clauses creating this equitable restriction have been held to be covenants personal to the parties. See *Hutchison v. Thomas*, 190 Penn. St. 242; *In re Fawcett*, 42 Ch. D. 150; *Clark v. Devoe*, 124 N. Y. 120.

In the construction which we have given to these deeds it is not necessary to consider whether in such a proceeding as that now before us considerations such as were held to be decisive in *Jackson v. Stevenson*, 156 Mass. 496, can be considered.

A decree must be entered declaring that the parcels of land belonging to the petitioner and described in this petition are no longer subject to the restriction contained in the deeds dated October 27, 1843, as to the house to be erected thereon being set back from the northerly line of Beacon Street.

*Decree accordingly.*

185	597
187	123
185	597
191	265

ELASTIC TIP COMPANY *vs.* JOHN R. GRAHAM.

BOSTON WOVEN HOSE AND RUBBER COMPANY *vs.* SAME.

Suffolk. March 4, 1904. — May 19, 1904.

Present: KNOWLTON, C. J., MORTON, LORING, & BRALEY, JJ.

*Contract, What constitutes. Evidence, Extrinsic affecting writings. Attorney.*

In an action by two creditors of an insolvent corporation for an alleged breach of an agreement in writing to purchase the plaintiffs' claims against the corporation, if it appears that the defendant signed an offer in writing to purchase the claims if secured within thirty days and that the plaintiffs accepted the offer by signing it within the specified time, the defendant may show by oral evidence that he handed the writing signed by him to the attorney for the plaintiffs upon the condition that it was not to take effect and he was not to carry it out unless a sufficient number of creditors signed to enable him to control the proceedings in insolvency and get possession of the assets, and further can show that the plaintiffs' attorney told the defendant "that such necessary proportion would be three fourths of the amount," so that the words used by the defendant might be found to mean that the paper was not to take effect as an offer unless three fourths in amount of the creditors signified their assent.

In an action by two creditors of an insolvent corporation for an alleged breach of an agreement in writing to purchase the plaintiffs' claims against the corporation, if it appears, that the defendant signed an offer in writing to purchase the claims if secured within thirty days and that the defendant handed the writing signed by him to the attorney for the plaintiffs upon the condition that it was not to take effect unless assented to by three fourths in amount of the creditors, and thereupon the defendant agreed to pay the attorney for the plaintiffs for his services in endeavoring to procure signatures of creditors other than his two clients, this special employment does not affect the relation between the plaintiffs and their attorney, nor make the condition as to the assent of three fourths in amount of the creditors imposed by the defendant any less binding on the plaintiffs because it was not made known to them by their attorney authorized to act in their behalf.

TWO ACTIONS OF CONTRACT for an alleged breach of a contract in writing. Writs dated March 12, 1897.

The first of these cases was before the court at a previous stage as reported in 174 Mass. 507, the same contract having been before the court in *Newton Rubber Works v. Graham*, reported in 171 Mass. 352.

In the Superior Court the two cases were tried together before *Sheldon, J.* The contract declared on was as follows:

"We, the undersigned, covenanting that we are creditors of the Quincy Cycle Company in the amounts set against our respective names, do hereby, each for himself, in consideration of one dollar and other good and valuable considerations to us, and each of us, paid by John R. Graham, of Quincy, Mass., the receipt whereof is hereby acknowledged, agree that at any time within thirty days from the date hereof, upon the tender to us by said John R. Graham, or by any one acting in his behalf, of the sum of fifty (50) per cent of the face value of our respective claims payable in notes of said Graham, said notes to be made payable as follows: 16  $\frac{2}{3}$  per cent in two (2) months, 16  $\frac{2}{3}$  per cent in three (3) months, and 16  $\frac{2}{3}$  per cent in four (4) months, without interest, or forty (40) per cent in cash, as each designates, we will assign, transfer, and set over to said Graham, or such person as he may request, our said respective claims against said Quincy Cycle Company, and all benefit, advantage, or rights pertaining to our said claims. All claims under fifty dollars (\$50) purchased under this option are to receive fifty per cent in cash; said assignment of our claims to be in the ordinary form and contain a power of attorney to enforce and collect the same, and to bring actions or proceedings on the same in our respective names, or in the name, but at the expense, of the assignee.

"Witness our hands, adopting a common seal, this sixth day of July, 1896.

"Boston, July 6, 1896.

"I authorize the above offer and agree to carry the same out if secured within the time named.

"John R. Graham.

"The Elastic Tip Company.

"The Boston Woven Hose and Rubber Company."

The other material facts sufficiently appear in the opinion. The plaintiffs requested the judge to rule and instruct the jury as follows:

"First. There is no evidence tending to show that the agreement was delivered by the defendant upon any condition other than that it was to be accepted within thirty days from the date thereof.

"Second. There is no evidence that the agreement was delivered to the plaintiffs with the understanding that it was not to be binding until the offer made was accepted by a certain number of the creditors of the Quincy Cycle Company.

"Third. If the agreement was first signed by the defendant it became a valid contract as soon as signed by the plaintiffs and delivered to the attorney who was acting for the defendant in securing the signatures of the creditors of the Quincy Cycle Company, and at any time after the plaintiffs had signed the agreement, and within thirty days from the date thereof, the defendant had a right to demand from the plaintiffs an assignment of their claims against the Quincy Cycle Company upon tender to the plaintiffs of the notes set forth in the agreement.

"Fourth. It is not open to the defendant to say as a matter of defence that the instrument was entered into upon the express condition that it should not be effective until the defendant should have secured the signatures of other creditors of the Quincy Cycle Company sufficient in number to control proceedings and composition in the insolvency of the Quincy Cycle Company.

"Fifth. On all the evidence the verdict should be for the plaintiffs."

The judge refused to make any of the rulings requested. In each case he submitted to the jury the following question: "Did the defendant execute and deliver as a binding agreement the agreement declared upon?" The jury answered "No." The jury found for the defendant; and the plaintiff in each case alleged exceptions.

*C. H. Sprague*, for the plaintiffs.

*Z. S. Arnold & W. G. A. Pattee*, for the defendant.

LOBING, J. The plaintiffs' first contention is that the words "I authorize the above offer and agree to carry the same out if secured within the time named," converted what was otherwise a written offer by the plaintiffs to the defendant into a written offer by the defendant to the plaintiffs, as explained in *Elastic*

*Tip Co. v. Graham*, 174 Mass. 507; that this written offer was accepted by the plaintiffs, that the writing signed by both thereby became a binding agreement, and that it is not open to the defendant to add by parol a new term to that agreement, as he now seeks to do, by showing that when these words were added to the writing and his signature was attached and the paper was handed to Mr. Herrick, the attorney for the plaintiffs, the defendant "stated that it was not to take effect and he was not to carry it out unless a sufficient amount of creditors signed to enable him to control the proceedings in insolvency and composition in the Insolvency Court, and get possession of the assets."

With regard to the substance of the thing stipulated for by the defendant when he handed the paper to Mr. Herrick, it is something which was capable of being made effectual in either one of two ways, namely: It could have been added to the offer as an additional term thereof, or the defendant could have made the delivery of the paper in which the offer is stated conditional on the requisite number of creditors coming into the arrangement. In the second case, the defendant in legal effect said to Mr. Herrick when the paper was handed to him: I intrust this paper to you, not as an offer on my part but as a paper which is to become an offer on my part when a specified number of creditors signify their intention of making me the offer stated in the body of the instrument, that is to say, of accepting my offer. Had the paper been sent by the defendant to the plaintiffs directly, enclosed in a letter written by the defendant, there would have been no opportunity for the mistake which has happened. But it was delivered to Mr. Herrick, and apparently through a misunderstanding this condition did not come to the knowledge of the plaintiffs.

We are of opinion that the judge was right in instructing the jury that such a condition in delivery could be shown by parol.

It is settled that a completed instrument may be shown by parol to have been delivered on a condition which has not been performed. *Faunce v. State Assur. Co.* 101 Mass. 279. *Watkins v. Bowers*, 119 Mass. 383. *Davis v. Jones*, 17 C. B. 625. *Bell v. Ingestre*, 12 Q. B. 317. *Pym v. Campbell*, 6 El. & Bl. 370. *Wallis v. Littell*, 11 C. B. (N. S.) 369. *Juilliard v. Chaffee*, 92

N. Y. 529, 535. *Benton v. Martin*, 52 N. Y. 570. *Sweet v. Stevens*, 7 R. I. 375. *Goddard v. Cutts*, 11 Maine, 440. *Coffman v. Coffman*, 79 Va. 504. *Westman v. Krumweide*, 30 Minn. 313. It is also settled that a defendant can show by parol that his signature to what purports to be a perfected agreement was to take effect on its being signed by others, and that they have not signed. *Butler v. Smith*, 35 Miss. 457. *Goff v. Bankston*, 35 Miss. 518. *Jordan v. Loftin*, 13 Ala. 547. In our opinion the case at bar comes within those decisions.

The plaintiffs' second contention is that the stipulation was meaningless and void because by reason of the provisions of Pub. Sts. c. 157, §§ 40, 41, a unanimous election did not insure the appointment of an assignee, composition proceedings did not apply to insolvent corporations, St. 1884, c. 236, § 15, and the oath required for proof of claims would have prevented the defendant from proving claims acquired by him under this agreement. Pub. Sts. c. 157, § 29. We assume that all this is so, but it appears that at a previous meeting when the defendant made a similar statement as to the condition on which he was willing to agree to buy these claims, the plaintiffs' attorney had told the defendant "that such necessary proportion would be three fourths of the amount." What the words used by the defendant under these circumstances meant or might be found to mean was that the paper was not to take effect as an offer until "three fourths in amount" of the creditors had signified their assent.

Finally, the plaintiffs contend that Mr. Herrick did not assume to act for the plaintiffs and that he acted solely for the defendant, and that as the plaintiffs testified that they did not know of the condition they are not bound by it. The correctness of this conclusion is not in question here. The judge instructed the jury that Mr. Herrick was acting for the plaintiffs, and we are of opinion that he was right. Mr. Herrick had been retained by the plaintiffs, and on the suggestion being made that the defendant might buy up the claims of the creditors generally at the same interview "the defendant agreed to pay Mr. Herrick for his services in endeavoring to procure signatures of creditors, other than his two clients the plaintiff corporations." Under that arrangement, so far as the plaintiffs were concerned, he continued to act for them.

*Exceptions overruled.*



185	602
188	436
185	602
193	313

**JAMES J. SULLIVAN vs. BOSTON ELEVATED RAILWAY  
COMPANY.**

**JOHN J. KNOX vs. SAME.**

**Suffolk. March 7, 1904. — May 19, 1904.**

**Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.**

*Negligence, In driving, Contributory. Damages, Remoteness.*

One driving a heavy brewery team along the right side of a street, the centre of which is occupied by the structure supporting an elevated railway with the tracks of a street railway on the surface below, if there is a team ahead of him headed in the same direction drawn up against the curbstone opposite one of the posts of the elevated structure and he has not room to pass between the team and the post without turning upon the track at his left, is bound before driving upon the track to look back to see whether he has an opportunity to do so without being struck by an approaching car; but, if he looks and seeing no car drives upon the track, it is not his duty to turn off the track until he has passed the post and has become aware of the approach of a car from behind. If in such a case the brewery wagon is struck from behind by a car, it is a question of fact whether the driver turned upon the track when the car was so near to him that a collision could not be avoided by due care on the part of the motorman, or whether having an opportunity to turn upon the track he did so and was run down by the negligence of the railway company.

One sitting on the seat of a brewery wagon beside the driver, not interfering at all with the driving but trusting himself entirely to the driver, if thrown out and injured through the negligence of a street railway company, can recover against the company if the driver was in the exercise of due care.

If the driver of a brewery wagon is thrown from his seat to the street, a distance of eight or nine feet, through the negligence of a street railway company in running one of its cars into his wagon from behind, and testifies that before the accident his health was good, and an expert testifies that such a fall could be an adequate cause of appendicitis, this will warrant a finding that inflammation of the appendix following the accident was caused by the collision.

**TWO ACTIONS OF TORT** for personal injuries from being thrown from the seat of a brewery wagon, in which the plaintiff in the first case was driving and the plaintiff in the second case was sitting by his side, by a collision, on Main Street in that part of Boston called Charlestown, caused by a car of the defendant running into the wagon from behind, through the alleged negligence of the defendant's servants. Writs dated January 17 and 24, 1901.

In the Superior Court the cases were tried together before

*Bell, J.* At the close of the evidence the defendant, among other requests, asked the judge to rule as follows:

"1. Upon all the evidence in the case the plaintiffs are not entitled to recover."

"4. There is no evidence in the case to warrant the jury in finding that the plaintiffs, or either of them, were in the exercise of due and proper care or took any precaution to avoid the accident and therefore neither of the plaintiffs is entitled to recover."

"6. There is not sufficient evidence of any negligence on the part of the motorman to warrant a verdict for the plaintiffs or either of them."

"10. If the jury find that the plaintiff Sullivan is entitled to recover damages the jury are instructed that there is no sufficient evidence that the appendicitis from which the plaintiff suffered at a time subsequent to the accident was a result of the accident or that the accident in any way contributed to the existence of that disease or in any way affected it.

"11. If the jury find that the plaintiff Sullivan is entitled to recover they are instructed to disregard, in the assessment of damages, all the evidence introduced in the case in regard to appendicitis or the operation for appendicitis."

The judge refused to give the rulings requested, and submitted the cases to the jury, submitting to them the special question: "Were the attacks of appendicitis from which the plaintiff Sullivan suffered caused by the accident." The jury answered "Yes."

The jury found for the plaintiff Sullivan in the sum of \$4,000, of which that plaintiff agreed to remit \$1,000, and for the plaintiff Knox in the sum of \$2,250. The defendant alleged exceptions.

*P. M. Keating, (J. H. Hurley with him,)* for the plaintiffs, was stopped by the court.

*W. B. Farr,* for the defendant.

*LORING, J.* At the argument the defendant waived the contention made by it in its brief that the evidence did not warrant a finding that it was guilty of negligence, and insisted only that there was no evidence of due care on the part of the plaintiffs and that the presiding judge should not have let the jury find that Sullivan's attack of appendicitis was caused by the collision.

The accident happened under these circumstances. Sullivan was driving a large brewery wagon half filled with empty beer barrels, on the right side of Main Street in Charlestown going toward Boston. The centre of the street was covered overhead by the elevated structure of the defendant, and on the surface by its tracks. The rows of iron posts supporting the elevated structure were thirteen feet from the curbstone, and the westerly rail of the westerly track was three feet east of the posts. The brewery wagon in question had wings or outriggers over the wheels, and at the wings was seven feet wide. A "team" which was ahead of the brewery wagon and headed in the same direction was drawn up against the curbstone, and between the curbstone and one of the posts of the elevated structure, as we understand the bill of exceptions. The space between this "team" and the post of the elevated structure not being sufficient to allow him to drive the brewery wagon between them, Sullivan "turned his team to the left and upon the track in order to pass by the post." When his horses' heads got to and beyond the post in question, one of the defendant's cars going from Charlestown to Boston ran into the wagon from behind, forced it against the post in question, threw one of the horses down, and knocked both plaintiffs from the seat of the wagon to the ground, a height of eight or nine feet.

Sullivan testified that "Just as I was swinging out I looked behind me, and I didn't see anything behind me, so I went right along and the first thing I knew I was going toward this post." He further testified that "From the time he swung into the track until the car struck his wagon the horses went about forty feet and were walking right along, straight ahead, the way the track runs." The nigh wheels were between the rails of the right hand track and the off wheels about a foot and a half outside the right rail of that track. On cross-examination he testified that he turned on to the track about thirty feet from the post, and that when the car struck his team his forward wheel was about five feet from the post. It was admitted that from the noses of his horses to the tailboard of his wagon was thirty feet.

There was evidence that the gong was not sounded. It did not appear from the plaintiffs' witnesses how far off the car was

when Sullivan turned the wagon in front of it. One of their witnesses testified that when he "first saw the brewery wagon it was coming right down the track, and the car was back about . . . fifty feet or so"; and that "he did not see the team until it was on the track, and did not know where it came from." Another witness testified that he "saw the brewery wagon on the track in front of the car going straight ahead, and the car struck it and knocked it to one side. When he saw the wagon the car was twenty-five or thirty feet from it." The defendant's motor-man, on the contrary, testified that the wagon was turned on to the track when ten or fifteen feet behind the post, and not over twenty to thirty feet ahead of the car; that he immediately sounded the gong, set the brakes, and, finding that they would not stop the car in time to avoid a collision, released them and reversed the car; and that when the car struck the wagon it (the wagon) had not finished turning in, but was "in a slanting position with reference to the rails."

The defendant's argument is that if Sullivan had looked as he said he did he would have seen the car. The plaintiffs' argument is that the car was so far behind the wagon when Sullivan drove on to the tracks that it was not then in sight. When it is said that it was not then in sight it is not meant that it could not have been seen by a person facing north in place of south, the direction in which Sullivan was driving, but that it was not in the sight of a person driving south who looks over his shoulder to ascertain whether he has an opportunity to drive upon the track, so far as a car coming up behind him is concerned. So far as a car coming up behind him was concerned, Sullivan was bound to look and see that he had an opportunity to get upon the track. When on the track he had a right to drive by the post, and it was not his duty to turn off the track until he was by the post and became aware of the approach of the car from behind. See in this connection *Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104; *Le Blanc v. Lowell, Lawrence & Haverhill Street Railway*, 170 Mass. 564. See also *Robbins v. Springfield Street Railway*, 165 Mass. 30.

It was for the jury to decide whether Sullivan turned in upon the track when the car was so near to him that a collision could not be avoided by the exercise of due care on the part of the

defendant, or whether he had an opportunity to turn in, succeeded in turning in, and then was run down through the negligence of the defendant.

We are therefore of opinion that there was evidence of due care on the part of Sullivan, and that the presiding judge was right in submitting the case to the jury.

We are also of opinion that he was right in letting the jury find a verdict in favor of Knox. Knox testified that "he did not interfere at all with the driving, but trusted himself entirely to Sullivan."

It was laid down in *Allyn v. Boston & Albany Railroad*, 105 Mass. 77, 79, that "if the plaintiff failed to use the care which prudence required, relying upon the vigilance of his companion, he must prove that Haskell was in the exercise of due care, not only in the management of his horse, but in using the necessary precautions to guard against danger from passing trains." Under this rule, the plaintiff Knox had a right to go to the jury on the question whether Sullivan exercised due care. See also in this connection *Randolph v. O'Riordon*, 155 Mass. 331; *Murray v. Boston Ice Co.* 180 Mass. 165.

Dr. Bottomley's testimony warranted the jury in finding that the inflammation of the appendix was caused by the collision. He properly was found qualified to testify as an expert, and testified "that such a fall as Sullivan testified to receiving could be an adequate cause of the appendicitis." That was sufficient, taken in connection with the plaintiff's testimony that his health was good before the accident. See in this connection *McGarrahan v. New York, New Haven, & Hartford Railroad*, 171 Mass. 211; *Houston v. Traphagen*, 18 Vroom, 23.

*Exceptions overruled.*

HELEN B. McCUSKER vs. ROBERT M. GOODE & another.

Suffolk. December 8, 1903. — May 20, 1904.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Equitable Restrictions. Limitations, Statute of.*

In a suit in equity to enjoin the defendant from selling a lot of land without imposing certain restrictions thereon, it appeared, that the owner of nine lots of land successively adjoining each other on the same street as shown on a certain plan sold one lot subject to certain restrictions and later advertised the other eight lots for sale at auction subject to the same restrictions. The plaintiff bought one of the lots at the auction and two other lots were sold at the auction to other purchasers, the restrictions being imposed by the respective deeds of the three lots. The other five lots were not sold at the auction. One of them subsequently was sold and was conveyed by a deed stating it to be "subject to such restrictions as are now in force and applicable to the granted premises, if any there be." More than six years after the auction this lot was conveyed to the defendant, who had no knowledge of any restriction, by a quitclaim deed without reference to the restrictions. At the time of the auction the plaintiff and the two other purchasers had signed a memorandum in writing but not under seal, by which each agreed to pay for the lot purchased by him on the terms of sale therein stated including the restrictions. *Held*, that the defendant's lot was subject to no restrictions for the benefit of the plaintiff's lot, and that if the plaintiff ever had any rights under the memorandum in writing which he could have enforced after the delivery and acceptance of his deed, such rights were barred by the statute of limitations at the time that the defendant bought his lot.

BILL IN EQUITY, filed July 19, 1902, by the owner of a lot of land on Townsend Street in that part of Boston called Roxbury, to enjoin the defendant Goode from selling a lot of land belonging to him on the same street without inserting in the deed thereof certain restrictions, and the defendant Norcross, trustee, from selling the same lot under the power of sale in a certain mortgage without inserting in the deed the same restrictions, and for a decree declaring the lot in question to be subject to the restrictions.

In the Superior Court the case was heard by *Mason*, C. J., who made a decree that the bill be dismissed with costs to each defendant. The plaintiff appealed. At the request of the defendants the judge made an order under Chancery Rule 35 appointing a commissioner to take the evidence to be reported to this court.

The advertisement of the auction at which the plaintiff purchased his lot was as follows :

"By L. Foster Morse, Auctioneer. Office, 56 Warren St. (telephone connection).

"Auction sale of 8 desirable lots of land on the Harris estate, Townsend St., Between Humboldt and Walnut Aves., Ward 21, Thursday, Oct. 13, at 3 o'clock P. M., on the Premises.

"The lots contain about 8000 square feet each, with frontage of 68 feet, 120 feet deep, restricted to single dwelling house, to cost not less than \$6000, to set back from the line of the street 25 feet, location good, 120 feet above tidewater ; water, sewer and gas in street, electric cars, Warren St., a short distance to Franklin Park ; plans can be seen at the office of the auctioneer ; \$200 to be paid on each lot at sale."

The memorandum signed by the plaintiff and by the two other purchasers at the auction was as follows :

"Boston, October 13th, 1892.

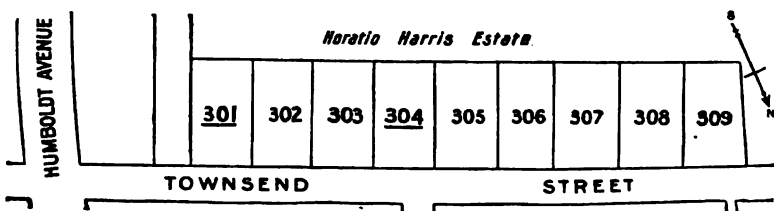
"I hereby acknowledge to have this day purchased at Public Auction from Joseph Stone *et al.* by L. Foster Morse, Agent and Auctioneer, the lot of land, number of lot, and feet of same set opposite my name for the price thereto affixed, subject to the following terms and conditions, a good title or no sale, ten days given from date to examine title unless more time is required to perfect the title, and the same to be extended in writing by the Auctioneer and Agent, \$200 required as a deposit and in part payment on each lot at sale, balance cash or 1/2 cash and 1/2 on a mortgage for      yrs at      %.

"Sale made subject to the following restrictions : That until January 1st, A. D. 1910, no building, other than one single dwelling house, to cost not less than six thousand dollars, and the structures usually appurtenant thereto, including a private stable, shall be erected on each lot ; and the line of all buildings other than private stables shall be placed twenty-five feet back from the street ; but porticoâ, bay windows, piazzas and front steps to buildings may project over said line and be placed within twenty-five feet of the street ; and all private stables shall be set back at least sixty feet from any street.

"Purchaser to assume and pay the taxes assessed on the property for the current year 1892, and having paid into the hands

of L. Foster Morse, Agent and Auctioneer, the sum of \$200 as a deposit and in part payment, I hereby agree to forfeit said sum to the use of the seller should I fail to comply with the residue of the terms and conditions of sale. A forfeiture of said sum will not release the purchaser of his liability under this contract."

The following is taken from the plan annexed to the plaintiff's bill:



Lot 301 was sold to the plaintiff at the auction. Lot 302 was sold at the auction to one H. S. Fisher, and lot 303 to one Samuel C. Keene. Lots 304, 305 and 307 were bid off at the auction but not sold. Lot 304 afterwards was sold to the defendant Goode. Lot 306 had been sold before the auction. Lots 308 and 309 were not bid off or sold at the auction.

*F. M. Forbush*, for the plaintiff.

*J. N. Palmer*, (*H. A. Smith* with him,) for the defendants.

KNOWLTON, C. J. This is a bill in equity brought to enforce certain restrictions upon the use of the defendants' land. The bill was dismissed and the plaintiff appealed. The testimony was heard orally by the presiding judge, and was reported by a commissioner and made a part of the record which came to this court.

The evidence tended to show, and we infer that the judge found, that neither of the defendants had any notice of facts on which the claim is founded, except that which appeared of record in the registry of deeds. There is nothing in the report to indicate that this finding was erroneous. The testimony was uncontradicted that each of the defendants had the title examined before taking his deed, and was told by the examiner that there were no restrictions upon the premises. We are, therefore, brought to the questions whether there was such an incumbrance upon the property, and if so, whether there was



anything in the registry of deeds that gave constructive notice of it.

The plaintiff's contention is that by reason of a sale of certain lots by auction, subject to restrictions as to the kind of buildings that might be erected upon them and the distance from the line of the street at which buildings might be erected, the purchasers acquired the right, among themselves and against the vendors who retained other lots, to have these restrictions enforced. The plaintiff purchased one of these lots, and the defendants' lot was one that was not then sold but was retained and subsequently sold by the vendors.

The pleadings and evidence show that eight lots along the street were offered for sale by auction, of which three were sold, one to the plaintiff and one to each of two other persons. A deed of his lot was made to each of the three, containing the restrictions. It is averred in the bill that three other lots were bid off at the sale but the respective purchasers thereof never completed their purchases and no deeds were ever executed or delivered to the purchasers. It is also averred that the remaining two lots were withdrawn from the sale immediately after the others were sold. The only proof as to these two averments is that two of the lots were bid off for the vendors and the third was bid off for a person of whom nothing is shown, and that two of the lots were not bid off by any one. All that the registry of deeds showed in regard to the defendants' lot is that the later conveyances described it as free from incumbrances, while two deeds earlier in the defendants' chain of title, one from one of the persons who sold to the plaintiff and one from his grantee, described the lot "as subject to such restrictions as are now in force and applicable to the granted premises, if any there be." It showed that there were no restrictions upon the lot, unless restrictions resulted from the sale of the other three lots already referred to, and from the sale by the same vendors of another lot on the same street, shown on the same plan, a considerable time before, the deed of which contained the same restrictions. None of these deeds in terms purported to give any rights in any other lots. They simply restricted the use of the lot granted, in the manner described. The plaintiff also introduced evidence that the advertisement of the auction sale and the announcement

of the terms of the sale by the auctioneer contained a statement that the eight lots would be sold at the auction, subject to these restrictions. The vendors were the owners of much other land in the vicinity, whose value would be affected by putting restrictions on these lots.

The principal question to be considered may be divided into two parts: first, did the auction sale give the purchasers rights among themselves, respectively, to have the restrictions enforced for their benefit; secondly, if it did, did their rights also extend to the lots which were retained by the vendors, and did the record give constructive notice of these rights to subsequent purchasers?

If the lots had all been sold according to the terms of the sale and deeds made accordingly, the facts would have justified, if not required, a finding that there was a general scheme of improvement in the division of the land into lots and the sale of them with restrictions, which was intended to give to every purchaser the benefit of the restrictions. *Parker v. Nightingale*, 6 Allen, 341. *Hano v. Bigelow*, 155 Mass. 341. *Jackson v. Stevenson*, 156 Mass. 496, 501. *Nottingham Patent Brick & Tile Co. v. Butler*, 15 Q. B. D. 261, 269; *S. C.* 16 Q. B. D. 778, 784. *Collins v. Castle*, 36 Ch. D. 243. *In re Birmingham & District Land Co.* [1893] 1 Ch. 342, 346, 349. *Tullmadge v. East River Bank*, 26 N. Y. 105.

There is good ground for contending that, after a sale upon such terms, at which some of the lots were retained by the vendor, a purchaser would have a right to insist that his deed should contain a stipulation that the remaining lots should be held and sold subject to the same restrictions. Thereby he would acquire an easement in the remaining lots, giving him the same rights in regard to their sale as he would have in regard to the lots already sold subject to the restrictions. *In re Birmingham & District Land Co.* [1893] 1 Ch. 342, 346, 349.

It is the policy of our law in regard to the recording of deeds, that persons desiring to buy may safely trust the record as to the ownership of land, and as to incumbrances upon it which are created by deed. R. L. c. 127, § 4. *Woodward v. Sartwell*, 129 Mass. 210. *Dow v. Whitney*, 147 Mass. 1. There was nothing contained in any deed which purported to restrict the use of

the lot sold to the defendant Goode. Restrictions contained in three deeds made at or about the same time, and in another made a considerable time before, would not show that the restrictions were imposed upon other lands which remained unsold. Restrictions resting simply in parol could not be enforced. R. L. c. 127, § 3. The statement in regard to restrictions in the advertisement of the auction sale was of no effect upon land that was not sold and which afterwards came to the defendant Goode. The paper stating the terms of the sale, which was signed by the plaintiff and others who bought lots, was a contract by each in regard to the purchase of his lot. If impliedly it gave rights in regard to the lots which were retained, it was merely a memorandum or preliminary contract, which never was recorded, and which was superseded by the completion of the sale, the delivery of the deed and the payment of the price, for all of which it provided. It is of no effect to create an incumbrance against a subsequent *bona fide* purchaser of land which was not sold at the auction.

The only question of difficulty in the case is that which we have already considered in part, whether a reference in the deed from the original owner to "such restrictions as are now in force and applicable to the granted premises, if any there be," is effective to create or continue an incumbrance upon the defendants' land. This depends upon whether there were then any restrictions "in force" upon it. If there were restrictions, they were created by the deeds. The plaintiff's deed was made on October 13, 1892, and presumably the deeds to the other purchasers at the auction were made about the same time. The deed of the defendants' lot, from one of the owners who originally offered it at auction, was made on June 15, 1899. In the meantime there had been a partition of the property, which was owned by tenants in common, and this lot had been set off to the owner who made the deed to the defendants' predecessor in title.

The paper signed by the plaintiff at the time of the auction was a simple memorandum, not under seal, and if rights ever could have been enforced under it, they were then barred by the statute of limitations. We are of opinion that these deeds to the purchasers gave them no rights to restrictions, that could be

enforced against the original owners seven years after the sale, upon the lots which they then retained. Whether the plaintiff could have enforced such restrictions against them immediately after the auction sale is a very different question, which we need not now decide.

*Decree affirmed.*



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## ADVERSE POSSESSION.

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*What constitutes.*

1. An assignment by a liquor dealer of his business and stock in trade to a trustee, to secure the assignor's indebtedness to certain brewing companies which have advanced money to pay for his licenses and certain other indebtedness, the assignor covenanting that he will give his whole time and attention to carrying on his business carefully and economically under the trustee's direction, will pay for all purchases in cash as far as possible, will keep accurate books of account, and will account to the trustee at least once a week for all moneys received or paid out by him less a salary of \$25 a week, with a power of sale in the trustee upon his being satisfied that the assignor is losing money in his business or on a breach of covenant by him, does not make the assignor the agent for the trustee in carrying on the liquor business, and one who has sold beer and ale to the assignor for use in that business cannot sue the trustee for the price. *Massachusetts Breweries Co. v. Hills*, 526.

*Agency (continued).*

2. In an action against a widow as executrix under the will of her late husband, on an account annexed and certain promissory notes, for liabilities alleged to have been incurred by the defendant through her son as agent, the notes being signed in the name of the estate of the defendant's husband by the son as attorney, it appeared, that the defendant's husband was a plumber, and that for nine months before his death the business had been wholly in charge of the son, that by his will the defendant's husband bequeathed his business to his son, with all stock in trade, book accounts and contracts, on condition that the son should make various other payments and also pay the "debts owing . . . on account of the business", and directed "that the written promise or guarantee of my said son, C., to the executrix of my will . . . that he will comply with and perform all the provisions, conditions and requirements of the bequest of the business as aforesaid, shall be sufficient to vest in my said son, C., the said business and property thereto appertaining." The son, without executing a written guaranty and before performing all the conditions named in the will, assumed and carried on the business on his own account with the consent of the executrix. The son in carrying on the business kept a bank account in the name of his father's estate and drew checks signed in the name of his father's estate by himself as attorney. The defendant signed a power of attorney authorizing her son to draw as her attorney any check upon this account, and to indorse for deposit and collection any check payable to the estate. The son testified that he wanted this power because checks kept coming in in the name of the estate. It appeared however that the plaintiff never knew of this power of attorney, and it did not appear that the plaintiff relied in any way upon the form of check or signature. The jury found for the defendant. *Held*, that this verdict was justified, there being evidence on which the jury could find that the son was carrying on the business on his own account and not as agent of the defendant, and also could find that the plaintiff was not misled by the acts of the defendant so as to create an estoppel. *American Tube Works v. Tucker*, 236.

*Scope of Authority of Agent.*

- Authority of mortgagee's agent to receive for him notice of tax sale, question for jury, see *Tax*, 16.
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*Mutual Rights and Liabilities.*

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4. If a real estate broker is employed to procure an option to purchase certain real estate at a price named, and does so, but his customer after

obtaining the option decides not to purchase the property, the broker is entitled to a commission only on the price paid for the option and is not entitled to a commission on the price at which his customer acquired the right to purchase the property. *Boardman v. Hanks*, 555.

Attorney of one party to proposed contract employed for special purpose by other party remains attorney of original client and his knowledge is attributable to client, see ATTORNEY.

#### ALTERATION OF INSTRUMENTS.

1. Where in an action on an instrument in writing the defence is set up that a material alteration was made in the instrument after execution, after the plaintiff has proved the execution of the instrument the burden is still upon him to establish the contract on which he has declared. *Graham v. Middleby*, 349.
2. In an action on an instrument in writing, where it is apparent on inspection of the instrument that either before or after delivery there was an alteration that may have been material, *semble*, that the presiding judge in his discretion may require the plaintiff to offer some explanation of the alteration before permitting it to be read, although the signatures of the parties to be bound have been admitted or proved. *Ibid*.
3. In an action on an instrument in writing, where the defence is set up that a material alteration was made in the instrument after execution, it is within the discretion of the presiding judge to permit the instrument to be read in evidence, after proof of execution, although it is typewritten and shows on its face that the letter "s" has been added to the word "contract" with a pen, there being evidence tending to show that more than one contract was referred to. *Ibid*.
4. In an action on a bond purporting to guarantee the performance of two contracts annexed to the bond, where the defence is that only one of the contracts was so annexed or referred to, if the bond is typewritten and shows on its face that the letter "s" has been added to the word "contract" with a pen, and the defendants contend that this alteration was made after delivery, and there is evidence that the bond and the two contracts in question although separate were to be treated as one transaction, the issue in substance is whether the several papers constituting the contract shown by the bond were delivered to the plaintiff in the condition disclosed by each paper when offered in evidence. *Ibid*.

#### AMENDMENT.

See PRACTICE, CIVIL.

#### ANIMAL.

Damages for injury to horse may include money expended in unsuccessful attempt to cure him and interest by way of damages between accident and verdict, see DAMAGES, 8, 9.



## ARREST.

One arrested for non-payment of taxes has right to require that provisions of statute be followed strictly, and as to notice before such arrest under St. 1889, c. 334, §§ 1, 4, see TAX, 1, 2.

## ARSON.

1. At a trial for wilfully and maliciously setting fire to a barn, the owner of the building, called as a witness by the Commonwealth, was asked by the defendant on cross-examination, whether tramps were in the habit of going into the loft of the barn. The presiding judge excluded the question. *Held*, that the exclusion of the question as calling for matters too remote was a proper exercise of the discretion of the presiding judge. *Commonwealth v. Hudson*, 402.
2. At a trial for wilfully and maliciously setting fire to a barn, by the burning of which a dwelling house also was burned, the owner of the building, called as a witness by the Commonwealth, testified in his direct examination that the buildings destroyed by fire were insured for \$3,500, and that they had cost \$3,850. The defendant offered evidence tending to show that the buildings cost much less than the sum named, for the purpose of showing that a person other than the defendant had a strong motive for setting fire to the buildings, and also for the purpose of impeaching the witness. The presiding judge excluded the evidence. *Held*, that the exclusion of the evidence, as too remote in its bearing either upon the guilt of the defendant or the credibility of the witness, was a proper exercise of the discretion of the presiding judge. *Ibid*.

## ASSIGNMENT.

1. In an action for an alleged breach of a contract in writing to convey certain land to the plaintiff, brought for the benefit of the plaintiff's assignee, the defendant can show that, when the defendant had no knowledge of the assignment, the nominal plaintiff requested an extension of the time of performance of the contract on the ground that he had not the purchase money ready, this being admissible against the assignee who had not notified the defendant of the assignment. So much the more is this so, where the assignor requesting the extension had an interest in the contract when the request was made. *Marcus v. Clark*, 409.
2. One who voluntarily assigns a policy of insurance on his own life cannot maintain a bill in equity for a cancellation of the assignment on the ground that the assignee has no insurable interest in his life. *King v. Cram*, 108.

Assignment of policy of life insurance is valid although assignee has no insurable interest in life of assured, in absence of evidence of gambling contract, see INSURANCE, 5.

Assignment of business and stock in trade to trustee to secure indebtedness of assignor, under which assignor carries on business, held not to make assignor agent of trustee in so doing, see AGENCY, 1.

Assignment of money to be received under contract for making and delivery of ordinary granite monument, not requiring personal services of assignor, is not assignment of "future earnings" which must be recorded to be valid against trustee process within meaning of R. L. c. 189, § 84, see TRUSTEE PROCESS, 1, 2.

Assignee of non-resident's right of action takes subject to defendant's right to bring cross action and set off judgments under R. L. c. 170, § 2, see PRACTICE, CIVIL, 14.

#### ATTACHMENT.

No lien acquired by attachment of property held by trustees for unincorporated association in action against trustees personally, see TRUST, 6.

#### ATTORNEY.

In an action by two creditors of an insolvent corporation for an alleged breach of an agreement in writing to purchase the plaintiffs' claims against the corporation, if it appears, that the defendant signed an offer in writing to purchase the claims if secured within thirty days and that the defendant handed the writing signed by him to the attorney for the plaintiffs upon the condition that it was not to take effect unless assented to by three fourths in amount of the creditors, and thereupon the defendant agreed to pay the attorney for the plaintiffs for his services in endeavoring to procure signatures of creditors other than his two clients, this special employment does not affect the relation between the plaintiffs and their attorney, nor make the condition as to the assent of three fourths in amount of the creditors imposed by the defendant any less binding on the plaintiffs because it was not made known to them by their attorney authorized to act in their behalf. *Elastic Tip Co. v. Graham*, 597.

Order denying petition of former attorney for reinstatement after disbarment held valid although made "without prejudice to his filing another like petition after" a date in the future, see PRACTICE, CIVIL, 84.

#### BAILMENT.

Termination of, by sale of property by bailee without authority, see CONVERSION.

#### BANKRUPTCY.

##### *Lien.*

1. A temporary injunction, upon a bill under Pub. Sta. c. 151, § 2, cl. 11, to reach and apply equitable assets of the defendant in payment of his debt to the plaintiff, issued more than four months before the defendant is adjudicated a bankrupt, creates a lien good against the trustee in bankruptcy under the bankruptcy act of 1898. *Snyder v. Smith*, 58.

Bankruptcy (*continued*).

*Rights of Trustee.*

2. A trustee in bankruptcy, under the bankruptcy act of 1898, has the same rights against the assignee of a policy of life insurance, taken out by the bankrupt and assigned by him in good faith before he was insolvent, that the bankrupt himself would have and no greater. *King v. Cram*, 103.

BASTARDY.

In a bastardy process under R. L. c. 82, the complaint was made in a lower court before the child was born, a supplemental complaint being filed in the Superior Court after the birth of the child, and it did not appear that the complainant had made any accusation before that contained in the complaint to the magistrate. The complainant was asked whether "from the first" she had accused the defendant of being the father of the child, and said that she had, and the complainant's mother was asked whether she ever had heard her daughter accuse any person other than the defendant of being the father of her child, and said that she had not. *Held*, that the words "from the first" must be taken to refer to the accusation made before the magistrate, and that there was no error in admitting the evidence to show constancy in accusation, for the purpose of laying a foundation for the admission, under § 16 of the statute, of an accusation by the complainant in the time of her travail which subsequently was testified to by the complainant and her mother. *Burns v. Donoghue*, 71.

BILLS AND NOTES.

*Fraud.*

1. Where it appears that a promissory note was put into circulation fraudulently, the burden of proof is upon one claiming title to the note to show that he gave a valuable consideration for it without knowledge of the fraud. *Regester's Sons Co. v. Reed*, 226.
2. If one receiving an accommodation note agrees not to sell it to A., and thereupon takes it to A. who lends money to B. with which B. purchases the note, and B. holds the note until he sells it to a *bona fide* purchaser, this does not show that the note was put into circulation fraudulently. *Mehlinger v. Harriman*, 245.

*Holder in Due Course.*

3. If one purchases an accommodation note for cash and sells it to a *bona fide* purchaser in exchange for the purchaser's own note, the purchaser may be found to be a holder of the note in due course within the meaning of R. L. c. 73, § 69, and entitled to recover its face value. *Mehlinger v. Harriman*, 245.

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As to consideration and authority for note signed in partnership name by one partner, see PARTNERSHIP, 2, 3.

Signature of married woman on back of promissory note payable to her husband void, see HUSBAND AND WIFE, 4.

**BOND.***Action on.*

1. An action on a bond, guaranteeing the performance of a contract, is for the penalty of the bond, and the amount of damages suffered by the breach of contract is not before the court until after judgment when application is made for an execution. *Graham v. Middleby*, 349.
  2. In an action on a bond guaranteeing the performance of a contract by a corporation to return to the plaintiff the money paid by him for a patented storage battery if its use should be enjoined and the injunction should not be dissolved within sixty days, where it appears that the defendants were directors of the corporation, the plaintiff need not show that he gave notice to the defendants of the default of the corporation. *Ibid.*
- In action against surety on bond to dissolve attachment, defendant estopped to claim attachment invalid. No defence that plaintiff has not exhausted other remedies and has not realized on collateral security, see **SURETY**, 9, 10.

As to liability of sureties on bond of defaulting collector of taxes, see **SURETY**, 1-8.

**BOSTON TERMINAL COMPANY.**

By St. 1896, c. 516, providing for a south union station in Boston, the Legislature neither expressly nor by implication granted to the Boston Terminal Company any part of the land of the Commonwealth under navigable waters, but gave that company the right to take in fee by right of eminent domain such portions of the land of the Commonwealth as were needed for the station and its approaches. Therefore the Commonwealth was entitled to recover from the terminal company under the terms of the act compensation for the land so taken. The fact that § 14 of the act required the terminal company without compensation to convey to the city of Boston for the location of Dorchester Avenue and Summer Street nearly one half of the land so taken, does not affect this conclusion, as this was an express condition imposed by the Legislature to which the company agreed by accepting the act. *Commonwealth v. Boston Terminal Co.* 281.

**BROKER.**

What commission earned when broker procures option to purchase real estate, see **AGENCY**, 3, 4.

**CARRIER.**

Liability of expressman to prosecution for transporting liquors into no license city or town without complying with provisions of R. L. c. 100, §§ 49, 50, see **INTOXICATING LIQUORS**, 3.

**CIDER.**

By R. L. c. 100, § 2, cider is intoxicating liquor without being shown to contain more than one per cent of alcohol. Necessity of license for its sale, see **INTOXICATING LIQUORS**, 1, 2.

## COMMISSIONERS.

*Compensation.*

1. Under St. 1901, c. 366, relating to the compensation of commissioners appointed by the Supreme Judicial Court or by the Superior Court, to hear parties, assess damages and make an award to be returned into court, the court has no power to order the compensation of the commissioners to be taxed as part of the costs or to be paid by one or both of the parties, the statute providing that such compensation as the court shall award to the commissioners shall be paid by the county in which they are appointed. *Semble*, however, that if the parties to the award have made a special contract providing that the parties or the unsuccessful party shall pay the compensation of the commissioners, it will be enforced. *Gloucester Water Supply Co. v. Gloucester*, 535.
2. St. 1901, c. 366, relating to the compensation of commissioners appointed by the Supreme Judicial Court or the Superior Court, which by its terms is made applicable to pending cases, applies to a case in which at the time of the passage of the act an award of commissioners is before this court on questions reserved by a single justice for determination by the full court, especially where the compensation of the commissioners is one of the matters reserved for decision. *Ibid*.

## COMMONWEALTH.

The Commonwealth, where it has not parted with its title, owns the soil under navigable waters within a marine league from extreme low water mark. *Commonwealth v. Boston Terminal Co.* 281.

No grant by Commonwealth under St. 1896, c. 516, to Boston Terminal Company of any land under navigable waters but merely right to take portions of such land in fee by eminent domain, see BOSTON TERMINAL COMPANY.

Land of Commonwealth in possession of obligee under bond for deed given by Commonwealth, who has erected buildings and is carrying on business there, exempt from taxation, see TAX, 6.

## CONFLICT OF LAWS.

In action here on foreign judgment, what defences open determined by law of this Commonwealth, see JUDGMENT, 3.

## CONSPIRACY.

*Civil Action.*

In an action of tort for an alleged conspiracy to injure the plaintiff in his business, it appeared, that the plaintiff was engaged in the business of quarrying granite and selling it to granite workers, and that the defendants were members of a voluntary association of granite workers, who, by the enforcement of a by-law imposing heavy fines for its violation,

were coerced into refusing to trade with the plaintiff because he was not a member of the association, whereby his business was ruined. *Held*, that it was error to order a verdict for the defendants, and that the case should have been submitted to the jury. *Martell v. White*, 255.

Remedy of stockholder for injury done to corporation by conspiracy is through action by corporation or by suit in equity, see CORPORATION, 1.

## CONSTITUTIONAL LAW.

### *Eminent Domain.*

1. If the owner of land through which runs a stream whose waters are taken under St. 1895, c. 488, to be used as a part of the metropolitan water supply, has acquired by prescription a right to pollute the stream, such right is included in the taking, and the owner is entitled to compensation for it under § 12 of the statute, as a damage sustained "by the interference with the use of any water, or by any other act or thing done by said board under this act." *Sprague v. Dorr*, 10.
- In taking land under grade crossing acts, it is immaterial that landowner had in fact no notice or knowledge of taking, if provisions of statute complied with, see GRADE CROSSING ACTS, 2.
- For grant by Commonwealth of right to take in fee by eminent domain land under navigable waters, see BOSTON TERMINAL COMPANY.

### *Vested Right.*

Right given by St. 1890, c. 437, to recover money paid on wagering contracts, lawfully restricted as to existing causes of action, see WAGERING CONTRACTS.

### *Police Power.*

Reasonable regulation.

2. St. 1903, c. 415, providing that sales of merchandise in bulk, not made in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against creditors of the seller, unless certain requirements for the information and protection of creditors are complied with, is constitutional. *Squire & Co. v. Tellier*, 18.
3. Special and general statutes, preventing the discharge into streams of polluting matter of such kind and amount as will corrupt or impair the quality of the water, are reasonable regulations of the exercise of private rights of property, and need not provide for compensation to persons having the ordinary rights of riparian owners. *Sprague v. Dorr*, 10.
4. The owner of land through which runs a stream whose waters are taken under St. 1895, c. 488, to be used as a part of the metropolitan water supply, is subject in his use of the stream to regulations made by the State board of health under § 24 of that statute, and such regulations may be enforced against him by the metropolitan water board under §§ 27, 28 of the same statute. *Ibid.*
5. Whether, in the exercise of the police power, the Legislature, without providing compensation, can forbid the pollution of water by one who has acquired a prescriptive right to pollute it as against other proprietors, *quære*. *Ibid.*

## CONTEMPT.

Justice of the peace taking deposition has no power to commit deponent to jail for contempt for refusal to answer proper question, see DEPOSITION, 1. Contempt of party failing to comply with order of court to pay alimony may be brought to attention of court by motion to dismiss his petition for nullity of marriage, see PRACTICE, CIVIL, 15.

## CONTRACT.

*What constitutes.*

1. In an action on a bond purporting to guarantee the performance of certain contracts annexed to it, it does not matter that the contracts referred to were not annexed to the bond at the time of signing, if it appears that the bond and contracts formed one obligation and were to be executed and then fastened together and placed in the hands of an agent for delivery to the plaintiff. *Graham v. Middleby*, 349.
2. The defendant in a letter to a ship broker dated September 26, offered to furnish a tug and coal barges at the price of \$225 per day, "beginning before November 1st, and continuing until May 1st." The plaintiff, a coal company, in a letter to the ship broker dated September 28, stated that it accepted the offer "from November 1st to May 1st," otherwise reciting it in accordance with its terms. The ship broker wrote to the defendant that its offer had been accepted by the plaintiff "from November 1st or earlier to May 1st." Later the defendant withdrew from the transaction and was sued by the plaintiff for breach of contract. *Held*, that there was no contract; that the letter of the plaintiff materially varied the terms of the defendant's offer and was not an acceptance but a new offer which the defendant never accepted, and the letter of the ship broker to the defendant, if it purported to report an acceptance of the defendant's offer in accordance with its terms, did so without authority from the plaintiff. No question of ratification was raised. *Metropolitan Coal Co. v. Boutell, etc. Co.* 391.
3. In an action by two creditors of an insolvent corporation for an alleged breach of an agreement in writing to purchase the plaintiffs' claims against the corporation, if it appears that the defendant signed an offer in writing to purchase the claims if secured within thirty days and that the plaintiffs accepted the offer by signing it within the specified time, the defendant may show by oral evidence that he handed the writing signed by him to the attorney for the plaintiffs upon the condition that it was not to take effect and he was not to carry it out unless a sufficient number of creditors signed to enable him to control the proceedings in insolvency and get possession of the assets, and further can show that the plaintiffs' attorney told the defendant "that such necessary proportion would be three-fourths of the amount," so that the words used by the defendant might be found to mean that the paper was not to take effect as an offer unless three fourths in amount of the creditors signified their assent. *Elastic Tip Co. v. Graham*, 597.

Subscription to parish on certain conditions held binding as unilateral contract on performance of conditions, see *post*, 10.

Acceptance of grant of location by street railway company does not constitute contract to fulfil condition of location illegally imposed, see *STREET RAILWAY*, 3.

Lessee entitled to notice before charge made for extra compensation under certain provision of lease where charge depends on matters peculiarly within knowledge of lessor, see *LANDLORD AND TENANT*, 4.

#### *Termination.*

4. In an action on a contract to pay "for the present" the plaintiff's bills for advertising done for a certain corporation in which the defendant was interested, it appeared, that it was understood by the parties that the advertising was for the benefit of the corporation and ultimately should be paid for by it, although done on the credit of the defendant, that the first four monthly bills were paid by the defendant and the next five were paid by the corporation although made out to the defendant, and the defendant usually was found in the office of the corporation where its treasurer was. The defendant offered to show that the plaintiff's agent brought the bills to the treasurer and asked him to pay them. *Held*, that this evidence would not warrant a finding that the defendant's promise had come to an end and that the advertising was done on the credit of the corporation. *Lewis v. Worrell*, 572.

#### *Execution.*

5. Where the execution of a contract in writing to perform certain work for a price named is in issue, the party relying on the contract may show by experts that the price named was a fair market price for the work, for the purpose of showing the probability of the execution of the contract. *Guglielino v. Cahill*, 375.

#### *Implied: Common Counts.*

6. No action lies to recover money paid for taxes for which the defendant was liable not paid at the defendant's request. *Massachusetts Mut. Life Ins. Co. v. Green*, 306.

7. In an action to recover damages for an alleged breach of a contract in writing to convey certain land to the plaintiff, if the plaintiff fails to prove a readiness to perform on his part, he cannot recover in that action a part payment he has made under the contract. *Marcus v. Clark*, 409.

Count for money paid, bad for want of averment that money was paid at defendant's request, not cured by allegation of subsequent promise of defendant, see *PLEADING, CIVIL*, 1.

Under R. L. c. 173, § 6, cl. 8, declaration good on account annexed for money paid without averment that money was paid at defendant's request, see *PLEADING, CIVIL*, 2.

City may recover from corporation negligently charging street with electricity amount city has paid on judgment against it for allowing street to remain thus charged, see *WAY*, 7.



Contract (*continued*).

*Specialty.*

- 8.. An instrument under seal is binding without a consideration. *Graham v. Middleby*, 349. Cases cited in *Hudson v. Miles*, 582.

Guaranty under seal of performance of covenants of lease needs no consideration, and is binding although executed after making of lease, see GUARANTY, 1.

*Consideration.*

9. If one pays by mistake a tax bill on land belonging to another person supposing it to be for a tax upon his own land, and the landowner promises to repay the amount if permitted to see his account kept by the person who paid the tax to ascertain whether the tax in fact was paid on his land, the performance of this condition is no consideration for the promise of the landowner to repay the amount of the tax, as he already had a right to examine his own account. *Massachusetts Mut. Life Ins. Co. v. Green*, 306.

10. An agreement in writing to pay to the sinking fund committee of a certain parish \$5 in each month for five years, in order to help in the payment of the debt of the parish, on condition that the whole amount of \$10,000 shall be in like manner subscribed or otherwise provided for, and other requirements be performed, is a formal offer which on performance of the conditions by the committee becomes binding, such performance being a good consideration for the subscriber's promise. *Robinson v. Null*, 345.

Instrument under seal binding without consideration, see *ante*, 8; GUARANTY, 1.

*Validity.*

Agreement between parties as to compensation of commissioners appointed under St. 1895, c. 451, enforceable, see COMMISSIONERS, 1.

Contract, made under St. 1894, c. 498, § 8, by resident of town to pay for tuition of children in another town with consent of its school committee, valid, see SCHOOL.

Contract on behalf of town to take water from unauthorized source invalid, see MUNICIPAL CORPORATIONS, 2, 3.

Contract valid by reason of statute when made not affected by repeal of statute, see STATUTE, 3.

*Construction.*

11. A period "from" a certain day when there is nothing to show the contrary excludes the day named. *Metropolitan Coal Co. v. Boutell, etc. Co.* 391.

12. A contract to pay bills incurred for a certain purpose "for the present" is a promise to pay the bills, in the absence of a termination of the contract by notice, for a period of indefinite length not unreasonably long, and when the facts are not in dispute how long a time is reasonable is a question of law. *Lewis v. Worrell*, 572.

13. The promise of the defendant, who was interested in a certain corporation, to pay "for the present" the plaintiff's bills for advertising to be done for the corporation, was held, on the facts of this case and in the absence of any occurrence to terminate the arrangement, to have remained in force as long as fifteen months. *Ibid.*

Lessee having option to purchase held bound to pay rent notwithstanding notice given of election to purchase where he has not offered purchase price or demanded deed, see *LANDLORD AND TENANT*, 5.

*Performance and Breach.*

Waiver of objection to title to land.

14. In an action for an alleged breach of a contract in writing to convey certain land to the plaintiff, it appeared, that the contract called for a conveyance free from incumbrances, and that the defendant before making the contract had imposed certain restrictions on his land, but it also appeared, that the plaintiff knew of these restrictions when the contract was made and was satisfied to take a conveyance subject to them and expected to do so, and did not raise the objection of the restrictions until the time for performance had expired without the plaintiff having the purchase money ready. *Held*, that it could be found that the plaintiff had waived any objection to the title based on the restrictions, and that to recover he must prove that the defendant wrongfully had refused to convey the land subject to the restrictions. *Marcus v. Clark*, 409.

Waiver of right to reject machine.

15. The plaintiff, a manufacturer of and dealer in machinery, made a contract in writing with the defendant, a cold storage company, the substance of which was, that the plaintiff was to deliver on the premises of the defendant a twenty ton evaporating apparatus of a certain type for making ice, and within one month the defendant was to pay the plaintiff \$1,500, unless in the meantime it appeared that the apparatus had not a capacity of twenty tons, or unless the defendant notified the plaintiff that the apparatus did not accomplish the results guaranteed by the company from which the plaintiff had procured it and requested its removal. The plaintiff delivered the apparatus of twenty tons capacity upon the defendant's premises in the manner required by the contract, and the defendant kept and used it. The plaintiff sued for the \$1,500. *Held*, that, in view of the facts stated above, evidence offered to show that the defendant did not accept the apparatus was immaterial, *also*, that evidence, offered by the defendant, that the apparatus produced bad ice was immaterial, *also*, that evidence, that the defendant expressed dissatisfaction and that efforts were made to improve the apparatus so that it would produce better ice, was immaterial, as the defendant did not within one month notify the plaintiff that the apparatus did not accomplish the results guaranteed by its maker and request its removal. *Penn. Iron Works Co. v. Hygeian Ice & Cold Storage Co.* 366.

Duration of contract.

- Where defendant had contracted to pay "for the present" plaintiff's bills for advertising done for corporation, evidence that plaintiff's agent asked treasurer of corporation to pay bills held not to warrant finding that defendant's promise had come to an end, see *ante*, 4.

*Measure of Damages.*

16. In an action of contract for the failure of the defendant to complete a building which he agreed to construct for the plaintiff, the damages which

*Contract (continued).*

- the plaintiff is entitled to recover are measured by the cost of the labor and materials necessary to complete the designated work which the defendant has left unfinished. *Hebb v. Welsh*, 335.
17. In an action by a publisher for damages for a refusal to receive and pay for a special set of the works of a certain author ordered by the defendant, where the only question relates to the assessment of damages, the plaintiff is entitled to recover his loss of profit caused by the defendant's breach of the contract, and therefore a request for a ruling that the plaintiff can recover only nominal damages or only the actual expense incurred before the order was countermanded should be refused. *Whether*, in such a case, on the receipt of a countermanding order from the defendant, it would be the duty of the plaintiff at once to stop work on the set of books to make the damage to the defendant as light as possible, *quære*. *Houghton v. Furbush*, 251.
18. A dealer in oils made an agreement in writing with the publisher of a newspaper to pay a certain sum of money for the publication of "our advertisement" in the newspaper once a week during a period named. He failed to furnish the advertisement when requested to do so and forbade the publisher to publish a certain old advertisement of the dealer from another newspaper advertising among other things certain articles which the dealer then did not have for sale. The dealer although often requested failed to furnish the new advertisement and the publisher published the old advertisement during the period covered by the contract and sued the dealer in contract, with a count for breach of contract and another count for the contract price of the advertising. *Held*, that the defendant committed a breach of his implied agreement to furnish an advertisement to be inserted in the plaintiff's newspaper and was liable in damages, which should include the profits that the plaintiff might have made under the contract, that the burden was on the plaintiff to prove his damages, and, if he introduced evidence that the damage would be the contract price, the jury would be warranted in assessing damages for that amount but would not be bound to do so, and it would be error to instruct the jury that as matter of law they should assess the damages at the contract price, performance of the contract by the plaintiff having been made impossible by the defendant. *Haynes & Co. v. Nye*, 507.

## Market value of machines.

19. On the issue of the market value of certain machines, where it appears that the only market for the machines in this Commonwealth is in selling them to jobbers for export, the measure of value is the market value here, and the value of the machines is not to be arrived at by deducting from their value in a foreign market an amount representing the expense and risk of sending them to that market. *United Shoe Machinery Co. v. Holt*, 97.

## CONVERSION.

Where a bailee of goods sells the property outright, without authority to do so, the bailment is ended, and the general owner has a right of immediate possession, on which he can maintain trover or equitable replevin. *United Shoe Machinery Co. v. Holt*, 97.

## CORPORATION.

*Remedy of Stockholder.*

1. A stockholder in a corporation cannot maintain an action at law for an injury done to the corporation by conspiracy or otherwise. His remedy is through an action by the corporation, or, if unable to induce action of the corporation or its officers for the benefit of the stockholders, then by a suit in equity. *Converse v. United Shoe Machinery Co.* 422.

*Foreign.*

## Dissolution.

2. The provision, originally enacted in St. 1819, c. 43, and now found in R. L. c. 109, § 53, that a corporation after dissolution shall exist for three years for the purpose of prosecuting and defending suits and settling its affairs, does not apply to corporations organized in other States. *Olds v. City Trust, etc. Co. of Philadelphia*, 500.
3. Whether, after the dissolution of a corporation in another State by the laws of which it was created, a creditor in this Commonwealth has no remedy in equity or otherwise by which he can take advantage of the former corporate existence for the purpose of availing himself of assets here, *quære*. *Ibid*.

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Where sureties on bond are directors of corporation which is principal on bond, they are presumed to know its financial condition and of its default on bond, see *Graham v. Middleby*, 349, 356.

Machinery of manufacturing corporation to be taxed as personal property. Abatement of tax on land and buildings of manufacturing corporation, see **Tax**, 3.

Manufacturing corporation not taxable for land within location of railroad company used by it under license, see **Tax**, 4.

## COUNTY COMMISSIONERS.

Petition for laying out private way over land situated entirely in one town may be made to county commissioners. Power of, to lay out private way over land of railroad company outside its route, see **Way**, 1, 2.

## CURTESY.

Husband's consent to wife's will does not operate as consent to will as materially changed by subsequent codicil although provision for husband remains the same, see **Will**, 1.

## DAMAGES.

*For Property taken under Statutory Authority.*

1. Where a statute limits the time within which a petition for damages must be brought, the court has no jurisdiction to entertain a petition brought after that time has expired. *Lancy v. Boston*, 219.

*Damages (continued).*

2. The general rule of law is that where the Legislature authorizes the taking of land for a public use, and the taking is in accordance with the statute, a plain and adequate remedy for compensation provided by the statute is exclusive. *Lancy v. Boston*, 219.
3. The owner of land adjoining lower land which has been taken for a park-way under the metropolitan park commission act, St. 1894, c. 288, cannot recover for injuries to his land caused by a drain pipe which passed through his land without right being cut on the land taken, so that the sewage from houses above no longer being carried off by the drain has flowed into his cellar. His remedy would be to stop the drain where it entered his land. *McSweeney v. Commonwealth*, 371.
- Right of riparian owner to compensation under St. 1895, c. 488, for restriction of prescriptive right to pollute stream, see CONSTITUTIONAL LAW, 1, 5.
- Provision of § 5 of St. 1894, c. 288, that damages be assessed "as is provided by law with respect to damages sustained by reason of laying out of ways" refers only to mode of procedure and not to elements of damage, see METROPOLITAN PARK ACT, 1.
- Under St. 1894, c. 288, § 5, providing for payment of all damages sustained by taking of land or right therein, owner of land not taken cannot recover for temporary injury by accumulation of surface water caused by taking of adjoining land, see METROPOLITAN PARK ACT, 2.
- Time as of which damages should be assessed under St. 1895, c. 488, § 14, see METROPOLITAN WATER SUPPLY ACT, 1.

*Grade Crossing.*

- Interest paid by railroad for money hired to pay for work required under St. 1892, c. 438, concerning grade crossings, not part of "expense" or "actual cost" of work, see GRADE CROSSING ACTS, 3.
- As to proportion of total cost of certain grade crossing proceedings in Taunton properly chargeable to street railway company, see GRADE CROSSING ACTS, 4.

*Value of Business.*

4. In assessing the value of a business, the net profits of the business for several years immediately previous are important evidence of the value of the good will, but they are not conclusive, as circumstances may have existed to make the profits more or less during those years than would be likely to be earned later. *Sawyer v. Commonwealth*, 356.
5. On a petition under St. 1895, c. 488, to determine the damages suffered by the members of a partnership owning an established business on land in the town of West Boylston decreased in value by the carrying out of that act, the income of the business after the passage of the act may be considered in determining the injury to the business caused by the act. *Ibid.*
6. On a petition to determine the damages suffered by the members of a partnership owning an established business on land in the town of West Boylston decreased in value by the carrying out of the metropolitan water

supply act, such sums as were allowed to the partners as a reasonable compensation for services rendered in the business should be deducted in determining the value of the business as a producer of income and in assessing damages for interference with it. *Sawyer v. Commonwealth*, 356.

7. On a petition under St. 1895, c. 488, § 14, to determine the damages suffered by the members of a firm owning an established business on land in the town of West Boylston decreased in value by the carrying out of that act, where it appeared that the commissioners had treated the business as one which was expected to continue, and which but for the enactment of the statute would have continued until the expiration of the partnership agreement, it was *held* that there was no error in the exclusion by the commissioners of the testimony of an expert actuary, offered by the petitioners, as to the expectation of life of the individual members of the firm. In case of the death of a partner the good will then existing would be a part of the partnership assets. *Ibid.*

*For Breach of Contract.*

Damages in action of contract for defendant's failure to complete building measured by cost of labor and materials necessary for completion, see CONTRACT, 16.

Damages for breach of agreement to supply advertisement to publisher of newspaper, see CONTRACT, 18.

Damages for refusal to pay publisher for special set of books printed and bound to order, and *quare* as to effect of countermanding order in such a case, see CONTRACT, 17.

Determination of market value of machines sold for export, see CONTRACT, 19.

*For Breach of Condition of Bond.*

In action on bond, amount of damages not before court until after judgment on application for execution, see BOND, 1.

*In Tort.*

8. If a horse is injured through the fault of another, and the owner reasonably expends money in the expectation of curing him but notwithstanding his endeavors the horse has to be killed, the owner may recover for the money thus expended in addition to the value of the horse. *Atwood v. Boston Forwarding & Transfer Co.* 557.

Interest.

9. In an action by the owner of a horse that was injured through the fault of the defendant and had to be killed after money reasonably had been expended in trying to cure him, it may not be error to instruct the jury to add interest in making up their verdict, for, although interest as such is not allowed in such a case, the jury in determining the amount of the damages may consider the lapse of time since the injury and the fact that the assessment is to be made on the day of the verdict for an injury which occurred a long time before. *Ibid.*

Damages (*continued*).

*Remoteness.*

10. If the driver of a brewery wagon is thrown from his seat to the street, a distance of eight or nine feet, through the negligence of a street railway company in running one of its cars into his wagon from behind, and testifies that before the accident his health was good, and an expert testifies that such a fall could be an adequate cause of appendicitis, this will warrant a finding that inflammation of the appendix following the accident was caused by the collision. *Sullivan v. Boston Elevated Railway*, 602.
11. Whether the climacteric of an unmarried woman about forty years old may occur before she has recovered from the results of a street railway accident and thus prolong her suffering, was held on the evidence in this case to be a question of fact for the jury. *Keefe v. Norfolk Suburban Street Railway*, 247.
12. In an action by a woman against a railroad company for injuries from a collision, where the defendant's liability was admitted and the only questions related to the damages to be recovered, it appeared, that the plaintiff by reason of her injuries from the collision became subject to attacks of dizziness, that she climbed into a pantry sink by means of a chair, to look at a leak in a water pipe above, and while standing in the sink had an attack of dizziness, fell to the floor and broke her wrist. She was allowed to testify to these facts, but the presiding judge excluded evidence of pain and inconvenience suffered from the broken wrist and instructed the jury not to consider the consequences of the broken wrist. *Held*, that the exclusion and the ruling were right, as the breaking of the wrist was not due to the railroad collision but to the plaintiff's voluntary and independent act in climbing into the sink to look at the water pipe. *Snow v. New York, etc. Railroad*, 321.

One fraudulently inducing another not to sell stock liable for loss to owner from fall in stock caused by discovery of embezzlement of funds of corporation, see **DECEIT**.

Defendant held liable in action for malicious prosecution for natural consequence of service of process, see **MALICIOUS PROSECUTION**, 3.

**DECEIT.**

One, who by fraudulent representations has induced another to refrain from selling shares of a certain stock which he was about to sell, is liable for a loss to the owner of the stock from a fall in its price caused by the discovery of an embezzlement of the funds of the corporation by one of its officers, which occurs while the owner of the stock is continuing to hold it acting under the inducement of the fraudulent representations. *Fotler v. Moseley*, 563.

**DEED.**

*Delivery.*

1. In a suit in equity seeking the cancellation of a deed of release of restrictions on the lots of land shown on a certain plan, where the bill alleged,

that the deed by its terms was not to take effect until executed by all the grantors, and that the defendant being one of the persons named as grantors did not execute the deed, having signed it but failed to deliver it to the plaintiffs or to record it, the defendant alleged in his answer "that the said deed was executed by all the parties named as grantors." *Held*, that this was an allegation that the defendant had delivered the deed. *Wentworth v. Eichorn*, 6.

Finding that defendant signed deed but did not deliver it to plaintiff and retained it refusing to record it, is not finding that deed was not delivered by defendant where owners of many lots including plaintiffs are parties to deed and each is grantor and grantee, see *EQUITY JURISDICTION*, 5.

#### *Reservation.*

2. One who gives a deed of land with full covenants of warranty cannot claim a reservation by implication of an easement of drainage through the granted land for the benefit of his remaining land. *McSweeney v. Commonwealth*, 371.

#### *Recording of Unacknowledged Deed.*

3. Whether the provisions of Pub. Sta. c. 120, §§ 7, 8, 13, (R. L. c. 127, §§ 10, 11, 16,) as to the manner of proving and certifying for record an unacknowledged deed after the death of the grantor, apply to a deed executed in 1776 and recorded in 1896, *quære*. *Butrick, petitioner*, 107.

#### *Unrecorded Deed when Competent as Evidence.*

4. An unrecorded deed is competent evidence to show that the premises thereby conveyed were not included in certain later deeds executed by some of the heirs of the grantor by which they released and transferred all right and interest which they had in any estate real and personal of their ancestor, the grantor of the unrecorded deed. *Butrick, petitioner*, 107.

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Deed to husband and wife before St. 1885, c. 237, conveys estate by entireties. Extrinsic evidence that grantees were husband and wife admissible, see *HUSBAND AND WIFE*, 1, 2.

#### DEPOSITION.

1. A justice of the peace, taking a deposition, has no power to punish a deponent refusing to answer a proper question by commitment to jail for contempt. The remedy in such a case is given by R. L. c. 175, § 11. *Lawson v. Rowley*, 171.
2. In this case it was assumed, without deciding it, that under R. L. c. 175, § 26, a deposition may be taken when, in the language of *Shaw*, C. J., 14 Gray, 131, the party taking it "fears, apprehends, believes that the witness is going to be absent [from the Commonwealth], and this appears to the magistrate to be reasonable." *Ibid*.



## DEVISE AND LEGACY.

*Construction.*

Supplying omitted words.

1. In construing a will omitted words cannot be supplied unless it is plain from the words used what words were omitted. Thus if a testator provides that on the death of his widow the residue of his estate shall be distributed among "such of" a brother and two sisters and the children of a deceased sister, the court will not undertake to complete a sentence of limitation by conjecture. *Child v. Child*, 376.

Date of ascertainment.

2. A testator devised and bequeathed the residue of his estate to trustees in trust for the benefit of his wife during her life, and then to "pay over, transfer and convey" the trust estate "to and among such of my brother and sisters, L., S. and F., and the children of my sister M., deceased (said children of M. to take the parent's share by right of representation), and in case my said brother F., or either of my said sisters, or any of said children of M., deceased, above mentioned die in my lifetime, or before said trust shall terminate, leaving children, such children shall take the parent's share by right of representation." *Held*, that the remainders were vested, and that the persons to whom the estate was to be distributed on the death of the testator's widow were to be ascertained as of the time of the testator's death. *Ibid*.
3. There is nothing inconsistent in a life tenant holding a vested interest in a remainder to take effect at his death, and the fact that a life tenant is one of a class to take under a will at his decease, is not enough to show that the testator intended the remaindermen to be ascertained at the termination of the life tenancy rather than at the time of his own death. *Cushman v. Arnold*, 165.
4. A testatrix, after making a large number of pecuniary legacies, provided that, in case her estate should be more than sufficient to pay the legacies in full, the residue should be paid to the several legatees in proportion to their legacies. By a codicil she left a dwelling house for life to one of the legatees named in her will on condition that she should make it her permanent home, and provided that "at her [the life tenant's] decease and before that event if, and whenever she shall have abandoned it as her permanent home, said house . . . shall fall into the rest and residue of my estate and be disposed of as is by said will provided for the disposal of said rest and residue." The estate of the testatrix was sufficient to pay all legacies in full and distribute a surplus among the legatees. The life tenant made the house her permanent home until her death. An administrator *de bonis non* with the will annexed was appointed, and filed a bill for instructions as to the distribution of the proceeds from the sale of the house. *Held*, that the remainders in the proceeds of the house vested in the legatees, including the life tenant, upon the death of the testatrix, and must be determined as of that date. *Ibid*.

Contingent remainder.

5. Where by the residuary clause of a will a fund is given to a trustee more than sufficient to pay certain annuities provided for, with a provision

that the surplus income shall be added to the principal during the lives of the annuitants, and that on the death of all the annuitants the entire fund including the accumulations shall be distributed, this tends to show an intention that the remainders shall be contingent and vest only upon the death of the last annuitant. *Cronan v. Adams*, 436.

6. A testator gave the residue of his estate to the Carney Hospital in trust, to pay certain annuities, which the estate was more than sufficient to pay, and then provided as follows: "The remainder of the income of said estate I direct to be added to the principal of the estate during the lives of said annuitants, and on the death of all, I direct the Carney Hospital to take to its own use one quarter of all the estate, and to convey the residue to the youngest Adams of the issue of Durward Adams whose descent is wholly in the male line from said Durward, in default I direct the trustee to convey said residue to the youngest of the issue of Julius Adams Ulman, in default I direct the trustee to convey said residue to the youngest of the issue of Durward Adams, in default I direct the trustee to convey said residue to the youngest of the issue of Elizabeth A. Ulman, in default I direct the Carney Hospital to take to its own use the said residue." *Held*, that the remainder was contingent on the circumstances existing at the death of the last annuitant, and did not vest in the person who answered the description of the beneficiary at the time of the death of the testator. *Ibid*.

Condition precedent.

7. A testatrix devised and bequeathed all the residue of her estate to one of her several heirs at law "to him and his heirs forever, provided that he shall take care of me and look after me while I live." The person named as devisee had no knowledge of the provisions of the will until after the death of the testatrix and had not performed the requirements of the clause. *Held*, that the devise was not of a fee simple, but upon a condition precedent to be performed during the lifetime of the testatrix, and that the fact that the devisee had no knowledge of the provisions of the will until after the death of the testatrix was immaterial. *Colwell v. Alger*, 5 Gray, 67, distinguished. *Brennan v. Brennan*, 560.

Of power granted to life tenant to expend principal.

8. A testator gave to his wife all of his estate "to have, hold and enjoy during her life: with power to change it into any other form of investment that may be deemed by her, beneficial, and to sell and dispose of any or all of it at her pleasure and discretion, whenever she may think it necessary or expedient for her own comfort and happiness, without accountability to any person whomsoever," and then gave "the reversion and residue of my said estate, if any, after my beloved wife's life interest therein, as stated above, is terminated by her decease," to two sisters, the issue of a deceased brother, and a brother in law of the testator. *Held*, that the discretionary power of the testator's widow to expend the principal of the property during her life was unlimited, and that her comfort and happiness for which she was free to use the property included not only physical comfort but mental satisfaction in devoting the money to

*Devise and Legacy (continued).*

charitable and philanthropic purposes. *Held, also*, that the fact, that the testator's widow had a private fortune of her own amply sufficient for her support, did not restrict the force of the testator's language. *Held, also*, that, in interpreting the language of the testator, it was proper to consider the extent of his estate, the mode of life in which his family had been reared and the means provided by him during his lifetime for their culture and happiness. *Dana v. Dana*, 156.

*Evidence of Attending Circumstances.*

In construction of bequest to widow for life with power to expend principal, fact that she has fortune of her own does not restrict gift, and amount of testator's estate and mode of life of his family may be considered, see *ante*, 8.

## DISSEISIN.

The bringing of a writ of entry against the occupant of land, before the expiration of the twenty years of his possession by reason of which the occupant claims title by disseisin, does not interrupt his possession, where the action has not been prosecuted to judgment and it appears that the tenant ultimately must prevail. *Butrick, petitioner*, 107.

## DOG.

The issuing of a dog license by a town clerk in the name of a certain person as owner is not evidence that the licensee was the owner of the dog, if it is not shown by whom the license fee was paid, or at whose request the license was issued. *Jordan v. Carberry*, 181.

## EASEMENT.

Husband cannot acquire by prescription right of way over land of his wife who is living with him on adjoining land of his own, see *HUSBAND AND WIFE*, 3.

Owner of artificial pond leased for manufacturing purposes, having reserved right to cut ice, may grant orally to tenant at will of ice house on pond right to cut ice in connection therewith, see *LANDLORD AND TENANT*, 2.

Right granted by lease to "flow, store and use water" in pond, reserving right in lessor to cut ice, does not give lessee right to turn hot water into pond, destroying ice, see *LANDLORD AND TENANT*, 3.

Grantor giving warranty deed cannot claim implied easement of drainage through land granted for benefit of his remaining land, see *DEED*, 2.

Where drain passing without right through land of petitioner is cut off by park commissioners taking adjoining land, petitioner has no right to compensation for resulting injury but may stop drain where it enters his land, see *DAMAGES*, 3.

As to existence and construction of equitable restrictions, see *EQUITABLE RESTRICTION*, 1-7.

Equitable restriction on land to be construed against grantor, and to favor freedom from restriction, see *EQUITABLE RESTRICTION*, 1.

Petition under R. L. c. 182, §§ 11-14, to determine restrictions on land is proceeding at law. *Quare* whether court on such petition can take into consideration fact that changed circumstances make enforcement of restrictions inequitable, see *PRACTICE, CIVIL*, 30; *EQUITABLE RESTRICTION*, 7.

#### ELECTIONS.

Under St. 1898, c. 548, §§ 335, 336, 361, town may, by vote at meeting held more than thirty days before next annual meeting, abandon method theretofore adopted of electing selectmen as provided by § 335, see *MUNICIPAL CORPORATIONS*, 1.

#### ELECTRIC LIGHT COMPANY.

Duty of town operating electric light plant to inspect its poles, and liability to lineman injured by fall of rotten pole, see *NEGLIGENCE*, 24, 28.

#### EMPLOYERS' LIABILITY ACT.

Action under, for instant death, brought by administrator for benefit of widow and children as alleged in declaration, may be amended by substituting widow and children as plaintiffs, see *PRACTICE, CIVIL*, 5.

#### EQUITABLE RESTRICTION.

1. In case of doubt a clause creating an equitable restriction on land is to be construed against the grantor and to favor freedom from restriction. *American Unitarian Association v. Minot*, 589.
2. The duration of an equitable restriction on land is a question of the intention of the parties to be arrived at by construing the words of the deed in the light of the attending circumstances. *Ibid.*
3. A provision in a deed of one of six city building lots on which the erection of a uniform block of six private dwelling houses is anticipated, that "the front line of the house to be built on the lot" shall be set back from the line of the street as marked and laid down on a certain plan, creates a restriction relating only to the house to be built at that time. *Ibid.*
4. If a deed of a city building lot creates a restriction of set back relating only to the house to be built there at that time, and refers to a plan on which a line extending across this and other lots is marked "Front line of buildings", the more general words on the plan cannot extend the restriction beyond its definition in the deed. *Ibid.*
5. A brick wall, extending from a house, built on part of a retaining wall as a screen, is not a building or "any part of or projection" from the house within the meaning of an equitable restriction using those terms. *Clark v. Lee*, 223.

*Equitable Restriction (continued).*

6. In a suit in equity to enjoin the defendant from selling a lot of land without imposing certain restrictions thereon, it appeared, that the owner of nine lots of land successively adjoining each other on the same street as shown on a certain plan sold one lot subject to certain restrictions and later advertised the other eight lots for sale at auction subject to the same restrictions. The plaintiff bought one of the lots at the auction and two other lots were sold at the auction to other purchasers, the restrictions being imposed by the respective deeds of the three lots. The other five lots were not sold at the auction. One of them subsequently was sold and was conveyed by a deed stating it to be "subject to such restrictions as are now in force and applicable to the granted premises, if any there be." More than six years after the auction this lot was conveyed to the defendant, who had no knowledge of any restriction, by a quitclaim deed without reference to the restrictions. At the time of the auction the plaintiff and the two other purchasers had signed a memorandum in writing but not under seal, by which each agreed to pay for the lot purchased by him on the terms of sale therein stated including the restrictions. *Held*, that the defendant's lot was subject to no restrictions for the benefit of the plaintiff's lot, and that if the plaintiff ever had any rights under the memorandum in writing which he could have enforced after the delivery and acceptance of his deed, such rights were barred by the statute of limitations at the time that the defendant bought his lot. *McCusker v. Goode*, 807.

7. Whether on a petition under R. L. c. 182, §§ 11-14, to determine the validity, nature and extent of an alleged restriction on land, the court can take into consideration the fact that changed circumstances have made the enforcement of the restriction inequitable, as would be done in a suit in equity to enforce the restriction, *quære*. *American Unitarian Association v. Minot*, 589.

Petition under R. L. c. 182, §§ 11-14, to determine validity, nature and extent of alleged restrictions on land is proceeding at law, see PRACTICE, CIVIL, 30.

Copy of deed containing restriction should be annexed to bill in equity seeking to enforce restriction, see EQUITY PLEADING AND PRACTICE, 1.

Waiver by purchaser of objection to restrictions on land as incumbrance, see CONTRACT, 14.

## EQUITY JURISDICTION.

*To reach and apply Equitable Assets.*

Loss of remedy by plaintiff's conduct.

1. In a general creditors' suit against an insolvent corporation in another jurisdiction, in which a receiver had been appointed, an order was made that such creditors as should indemnify the receiver for costs and expenses might prosecute certain claims of the corporation, and should be entitled to the proceeds thereof coming into the hands of the receiver to the exclusion of other creditors and persons who did not within thirty days after notice of the order join in providing security for the payment of costs and

expenses. A creditor then a party to the suit did not elect to join in the prosecution of the claims. By a subsequent order the time for electing to share in the prosecution of the claims was extended. Before this extension had expired, the creditor by leave of court withdrew from the general creditors' suit. The creditors who joined in the expenses prosecuted in this Commonwealth the claims covered by the order to a successful issue. Nearly four and a half years after he had elected not to contribute to the prosecution of these claims, and nearly three years after their successful prosecution by those who did contribute, the creditor, who had withdrawn from the general suit, brought a suit of equitable attachment in this Commonwealth, under R. L. c. 159, § 3, cl. 7, to reach the funds decreed to be due the corporation in the Massachusetts suits and prevent their passing to the hands of the receiver. *Held*, that the plaintiff had no standing in equity to maintain such a bill, that having elected not to contribute to the prosecution of the Massachusetts suits he in equity must yield to the prior rights of the creditors who contributed to them and prosecuted them to a successful termination. *Gerding v. East Tennessee Land Co.* 380.

As against receiver appointed by another court.

2. A creditor of an insolvent corporation, organized in another State, who voluntarily has become a party to a general creditors' suit against the corporation in the Circuit Court of the United States in a district of the other State, in which a receiver has been appointed, will not be allowed to maintain a suit of equitable attachment under R. L. c. 159, § 3, cl. 7, in this Commonwealth, for the purpose of reaching funds which have been held by this court to be due to the corporation, the title of the receiver being good as a matter of comity. *Ibid*.
3. The receivers of an insolvent railroad corporation, under a decree of court, sold and conveyed all the property in their hands to a new corporation formed for the purpose, the decree providing that the purchaser should take the railroad property "subject to the lien, of any and all debts, obligations and liabilities, of the receivers." A fireman, injured while employed on a locomotive engine operated by the receivers, sued the new company for his injuries. The receivers had been discharged without having recognized the plaintiff's claim, and no permission to sue the receivers had been given by the court by which they were appointed. *Held*, that the plaintiff had no cause of action in tort or contract against the defendant, and that if he had any equitable right to reach and apply in satisfaction of his claim property which had come to the defendant from the receivers, this court would not assume jurisdiction of it, but he must resort to the court which administered the property and by whose decree the sale to the new company was made and confirmed. *Tobin v. Central Vermont Railway*, 337.

Lien of equitable attachment.

Temporary injunction upon bill under Pub. Sts. c. 151, § 2, cl. 11, when issued more than four months before defendant's adjudication in bankruptcy, creates lien good against trustee in bankruptcy, see BANKRUPTCY, 1.

*Equitable Replevin.*

Unauthorized sale of goods by bailee gives general owner right of immediate possession on which he may maintain suit of equitable replevin, see CONVERSION.

*Specific Performance.*

Substantial performance by plaintiff.

4. A supply company lent to a company manufacturing time stamping machines a certain sum of money for which the manufacturing company gave its note, and the plaintiff, president of the manufacturing company, assigned to the supply company as collateral security a mortgage made by the manufacturing company to him personally. The supply company agreed in writing with the manufacturing company to reassign the mortgage to the plaintiff and cancel the manufacturing company's note on receiving stamping machines at a certain discount price to the full amount of the note within three months from its date. The supply company made an additional oral contract with the plaintiff that, when it had received from the manufacturing company goods which amounted to the face value of the note, it would reassign the mortgage to the plaintiff. In a suit in equity to enforce this oral agreement, it was *held*, that the plaintiff was entitled to a reassignment of the mortgage on showing that goods were furnished to the supply company nearly to the amount of the note and that the balance due on the note was tendered although more than three months after the date of the note, a strict performance of the conditions not being required in equity if they were performed in substance. *Wilson v. Mulloney*, 480.

*To cancel or record Deed.*

5. In a suit in equity seeking the cancellation of a deed of release of restrictions on the lots of land shown on a certain plan, where the bill alleged, that the deed by its terms was not to take effect until signed by all the grantors, and that the defendant, being the owner of one of the lots, signed the deed but did not deliver it to the plaintiff, the owner of another of the lots, and did not record it, a finding that the defendant signed the deed but did not deliver it to the plaintiff and did not record it, but retained it in his custody refusing to record it, is not a finding that the deed was not delivered by the defendant, the owners of many lots being parties to the deed and each of them being a grantor and a grantee. If on such a state of facts the plaintiff has a remedy, it is founded on a right as one of the grantees to have the deed recorded. *Wentworth v. Eichorn*, 6.

*To relieve against Forfeiture.*

6. A lessee of real estate, bound to pay taxes, is not entitled to relief in equity from a forfeiture of his lease for non-payment of taxes after the leased premises have been sold by the collector for such non-payment, where he does not show that his breach of condition in allowing the premises to be sold for taxes was due to an accident or mistake on his part. *Gordon v. Richardson*, 492.

7. In a suit in equity seeking relief from a forfeiture at law it is not open to the plaintiff to contend that there was no forfeiture at law. *Gordon v. Richardson*, 492.
8. Whether a lessee, expelled from the leased premises on the ground of forfeiture, can attack the forfeiture at law and if unsuccessful can seek relief from the forfeiture in equity, or whether he must make his election of remedy in the first instance, *quære. Ibid.*

*To set aside Assignment.*

One voluntarily assigning policy of insurance on his own life cannot maintain bill for cancellation on ground that assignee has no insurable interest in his life, see **ASSIGNMENT**, 2.

*For an Accounting.*

Suit for accounting between partners on dissolution, see **PARTNERSHIP**, 4-8.

*To restrain Use of Trade Name.*

9. One, who has established the right to the use of the word "Rex" as a trade mark or trade name designating dyspepsia tablets, may maintain a suit in equity against a person using the word "Rexall" to designate similar dyspepsia tablets, although the defendant began the use of that word innocently without intention of imitating the trade name of the plaintiff, if, after notice of injury to the plaintiff, the defendant continues to use the word "Rexall" in such a way that the public are likely to be misled, and an injunction will be granted to restrain the defendant from such unlawful use of the word in the future, whether the plaintiff has suffered pecuniary injury before the filing of his bill or not. *Regis v. Jaynes & Co.* 458.

*To enjoin Nuisance.*

10. The Supreme Judicial Court has no jurisdiction to entertain a bill in equity, to restrain a corporation from carrying on without a license the business of melting and rendering grease and tallow and making food for fowls from oysters and other sea shells, in a building where the business was established before May 8, 1871, the defendant never having killed horses or done any rendering of horses or other dead animals, and never having used or required in its business trucks or wagons for the removal of dead animals. Such a case is exempted from the provisions of R. L. c. 75, § 108; and *semble*, that § 111 of the same chapter does not apply to it, but, if it does, it provides only for fine or imprisonment and gives no remedy in equity. *Cambridge v. John C. Dow Co.* 448.

*Taxpayer's Petition.*

Taxpayer's petition under R. L. c. 25, § 100, is proper remedy to restrain mayor from expending money or incurring obligations for work ordered by him in excess of authority, see **MUNICIPAL CORPORATIONS**, 4.



*Receiver.*

Equities in fund held by receiver may be adjusted by petition filed in suit in which receiver appointed, see **JOINT TORTFEASORS**.

Jurisdiction as against receiver appointed by other court, see *ante*, 2, 3.

*Waiver of Objection to Jurisdiction.*

By appearing at hearing on merits before master without objection to jurisdiction in equity, defendant waives such objection, see **EQUITY PLEADING AND PRACTICE**, 7.

**EQUITY PLEADING AND PRACTICE.***Bill.*

1. In a bill in equity to enforce an equitable restriction, a copy of the deed containing the restriction should be annexed to the bill. *Clark v. Lee*, 223.

*Parties.*

2. A suit in equity to obtain possession of certain machines, after it was shown that the machines had been shipped out of the Commonwealth, was retained by the Court for the assessment of damages, thus changing the suit from equitable replevin to a proceeding in the nature of trover. The lessee of the machines had sold them outright without authority, and both the lessee and the purchaser were made defendants. The defendant purchaser objected that the lessee was joined improperly as a defendant. *Held*, that, assuming that the same rule applied in equitable replevin as at law, by which only the person in wrongful possession of the chattels could be sued in replevin, yet the defendants would have been liable jointly in trover and were retained properly as defendants in the assessment of damages. *United Shoe Machinery Co. v. Holt*, 97.
3. In a suit in equity it is too late, on the conclusion of the taking of evidence before a master, for a defendant to make objection to the joinder of another defendant as a party. *Ibid*.

*Appeal.*

4. On an appeal in equity this court will not reverse findings of fact made by the court below unless clearly erroneous. *Register's Sons Co. v. Reed*, 226.
5. Upon an appeal from a decree of a judge sitting in equity upon questions of fact arising on oral testimony heard by him, his decision will not be reversed unless it is plainly wrong. In this case the judge's findings of fact were supported by the evidence. *Colbert v. Moore*, 227.
6. On an appeal from a decree dismissing a bill in equity, where the evidence is made part of the record but there is no statement of facts found or rulings made, the decree will not be reversed on matters of fact unless clearly erroneous. *Gordon v. Richardson*, 492.

*Double Costs.*

Double costs were ordered on appeal held frivolous in *East Tennessee Land Co. v. Leeson*, 4.

*Objection to Jurisdiction in Equity.*

7. A bill in equity was brought to obtain possession of certain machines. On an application for a temporary injunction, it was found as a fact that the machines had been shipped out of the Commonwealth, and the defendant was ordered to file an answer before the time for filing it under the rules of court. The case was sent to a master and proceeded to a hearing. In this court the defendant raised the point that on the facts there was no jurisdiction in equity. *Held*, that this point was not open to the defendant; that, by the order directing the answer to be filed before it was required by the rules, the court retained the suit for the assessment of damages, and that, by appearing before the master without objection to the jurisdiction, the defendant had waived this objection, even if it would have been good had it been made at the proper time. *United Shoe Machinery Co. v. Holt*, 97.

*Report.*

8. In a suit in equity coming to this court by report, where the evidence was not taken by a commissioner and is not reported in full, the conclusions of fact stated in the report must be taken to be true. *King v. Cram*, 103.

*Master's Report.*

9. Where a master's report does not state all the evidence, the master's findings of fact cannot be revised if warranted by the evidence stated in his report. *Regis v. Jaynes & Co.* 458.
10. Chancery Rules 31 and 32 of the Supreme Judicial Court are in force in equity causes in the Superior Court, and exceptions to a master's report must be taken in the manner there directed. *Hillier v. Farrell*, 434.
11. This court cannot revise the findings of a master unless exceptions have been taken to his report. *Ibid.*

*Decree.*

12. A sum of money ordered by a decree in equity to be paid as damages bears interest from the date of the decree although the amount in part is made up of interest. *East Tennessee Land Co. v. Leeson*, 4.
13. A decree in equity will not be set aside for a defect in form in not stating the amount of the costs. *Ibid.*

*Election of Remedy.*

After appointment of receiver of corporation, creditor electing not to contribute to prosecution of certain claims of corporation cannot afterwards maintain bill in equity to reach and apply to his debt proceeds of such claims, see EQUITY JURISDICTION, 1.

*Quære*, whether lessee expelled for forfeiture of lease can attack forfeiture at law and if unsuccessful seek relief in equity, or must elect his remedy in first instance, see EQUITY JURISDICTION, 8.

*Inconsistent Remedies.*

In suit seeking relief from forfeiture at law plaintiff cannot contend that there was no forfeiture at law, see EQUITY JURISDICTION, 7.

*Petition filed in pending Suit.*

Equities in fund held by receiver may be adjusted by petition filed in suit in which receiver appointed, see JOINT TORTFEASORS.

## ESTOPPEL.

Receipt does not operate as estoppel but is conclusive unless contradicted, see EVIDENCE, 13.

Tenant who remains in possession until end of term estopped from setting up eviction, see LANDLORD AND TENANT, 7.

Surety on bond to dissolve attachment by trustee process, on giving of which plaintiff released alleged trustee, estopped to set up that trustee could not have been held, see SURETY, 9.

Executrix under will of her husband allowing business to be carried on by her son in name of the estate, although really on his own account, not estopped to deny that her son was her agent as such executrix in incurring certain liabilities, if creditor was not misled by her acts, see AGENCY, 2.

For election of remedy in equity, see EQUITY JURISDICTION, 1, 8.

## EVIDENCE.

*Presumptions and Burden of Proof.*

1. In the absence of evidence on the subject there is no presumption that the statutes of another State are like those of this Commonwealth. Thus there is no presumption that the statutes of New York give power to any court in New York to dissolve a corporation. *Olds v. City Trust, etc. Co. of Philadelphia*, 500.

Burden on holder of note fraudulently put into circulation to prove himself purchaser for value without notice, see BILLS AND NOTES, 1.

When alteration set up as defence to action on instrument in writing burden is on plaintiff to prove its contents after proving execution, see ALTERATION OF INSTRUMENTS, 1.

*Judicial Notice.*

Court takes judicial notice of statutory obligation of city to keep street in repair, see WAY, 4.

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*Relevancy and Materiality.*

Uncommunicated purpose immaterial.

2. In an action for an alleged breach of a contract in writing to convey certain land to the plaintiff, the defendant introduced evidence that the day after the time for the performance of the contract had expired the

assignee of the plaintiff, for whose benefit the action was brought, stated to the defendant's attorney that "he had difficulty in getting the money" and asked for an extension of time. The plaintiff offered to show in rebuttal that the assignee's real purpose in asking for the extension was that he wished to ascertain whether he could handle the property with certain restrictions on it which he recently had found to exist. *Held*, that the evidence offered in rebuttal was inadmissible, a secret purpose of the plaintiff's assignee undisclosed to the defendant's attorney when he made the statement to him being immaterial. *Marcus v. Clark*, 409.

On issue of propriety of executor's investment, evidence that prudent men were making similar investments properly excluded, see **EXECUTOR AND ADMINISTRATOR**, 5.

In action for personal injuries caused by coming together of two street cars evidence that no other passengers in car in which plaintiff was were injured, is relevant, see **NEGLIGENCE**, 10.

In action for damages suffered by partnership to business, testimony of expert actuary as to expectation of life of partners properly excluded, see **DAMAGES**, 7.

On issue of value of and damage to partnership business, sums allowed to partners as compensation for services rendered should be deducted in reckoning income produced, and net profits before and after act complained of are admissible as to value of business and damages to it, see **DAMAGES**, 4-6.

Course of conduct of parties admissible to show construction of lease only includes parties to lease and not conduct of lessee and of one claiming adversely to lessee whose conduct was not known to lessor, see **LANDLORD AND TENANT**, 6.

Conversations between owner and one claiming to be tenant at will of land admissible to show existence and terms of tenancy although varying terms of lease from owner to another claiming adversely to alleged tenant at will, see **LANDLORD AND TENANT**, 1.

In action for price of ice machine, if it appears that defendant kept and used it instead of requesting its removal as required by contract in case of rejection, evidence offered by defendant that he did not accept machine and expressed dissatisfaction with it and that it made bad ice is immaterial, see **CONTRACT**, 15.

#### *Competency.*

To show probability of execution of contract, evidence showing that price named was fair market price, is admissible, see **CONTRACT**, 5.

Issuing of dog license not evidence that licensee was owner unless shown by whom fee was paid or at whose request license issued, see **Dog**.

In action for personal injuries, evidence that three years before accident plaintiff was subject to fainting spells is competent to contradict her statement, that she never had been subject to fainting fits, and also as bearing on question whether fainting spells were caused by the accident, see **NEGLIGENCE**, 15.

*Collateral Issues: Remoteness.*

3. The exclusion of evidence involving collateral issues is within the discretion of a trial judge. *Laing v. Mitten*, 233.
4. In an action against the proprietor of a cotton mill by a bobbin girl for injuries from having her fingers caught in the uncovered gearing of a machine, it is within the discretion of the presiding judge to exclude a question by the defendant calling for a statement of what a witness knew as to gears of this kind being operated without covers in other mills. *Dolan v. Boott Cotton Mills*, 576.

On issue of propriety of executor's investment, evidence that prudent men were making similar investments properly excluded, see EXECUTOR AND ADMINISTRATOR, 5.

At trial for setting fire to barn, evidence properly may be excluded that tramps were in habit of going into barn and that building was worth less than amount of insurance upon it, see ARSON, 1, 2.

In action for personal injuries, evidence that three years before accident plaintiff was subject to fainting spells is competent to contradict her statement, that she never had been subject to fainting fits, and also as bearing on question whether fainting spells were caused by the accident, see NEGLIGENCE, 15.

*Opinion: Experts.*

What expert may testify to.

5. An analytical and consulting chemist may be allowed to testify as an expert that the upper part of a certain sling rope which he has examined has been wet with salt water and has come in contact with an iron ring which was rusted, and as to the effect which iron rust and salt water produce on a manila rope like the one examined. *Carter v. Boston Towboat Co.* 496.

Qualification of expert.

6. Although the decision of a presiding judge as to the qualification of an expert is conclusive unless upon the evidence it appears to be erroneous, yet where it appears that a witness, offered as an expert as to the value of a certain small island taken for a public park, has known the land in question for many years, has traded to a considerable extent in land in the same town, and in six different years near the time when the land was taken has valued the land as an assessor of the town, the exclusion of his testimony on the ground that he is not qualified as an expert is error in law. *Muskeget Island Club v. Nantucket*, 303.
7. Where a petitioner for damages, for the taking of a small sand island off the coast of Nantucket, based his claim on the value of the land for shooting purposes, it was held that a witness offered by the respondent, otherwise qualified as an expert to testify as to the value of the land, should not have been excluded as an expert because he testified that he never had been on the island and personally knew nothing of the shooting there although he had seen a good deal of shooting in the vicinity, because the real question was the fair market value of the land in view of all the purposes for which it was adapted or might be used, and the jury might not

have taken the view of the petitioner that its value was to be determined for shooting purposes alone. *Muskeget Island Club v. Nantucket*, 303.  
Exception may be sustained to wrongful exclusion of testimony of expert as to value of land on ground of non-qualification as expert, although it does not appear what his testimony would have been, see PRACTICE, CIVIL, 28.

*Of Value of Real Estate.*

Exclusion of witness offered by respondent as expert on value of certain island, which petitioner contended was valuable for shooting purposes, held erroneous although witness never had been on island and personally knew nothing of the shooting there, see *ante*, 6, 7.

*Extrinsic affecting Writings.*

8. The rule that oral evidence is not admissible to vary the terms of a contract in writing applies only to parties to the contract. *Wilson v. Mulloney*, 430.
  9. Oral evidence of the actual occupation and use of land by different owners is admissible to show what was meant by the words "in front of the house" in a series of deeds conveying respectively the lower half and the upper half of "the small piece of land in front of the house." *Graves v. Broughton*, 174.
  10. In an action for an alleged breach of a contract in writing, to build two houses and a stable for the plaintiff, by the defendant's failure to put a soil pipe in the stable, oral evidence is admissible to show the meaning of the words "all the plumbing work on . . . one stable . . . the work to be . . . accepted by the plumbing inspectors of the city of Boston", and for this purpose the plaintiff may introduce evidence of conversations between himself and the defendant at and before the time of signing the contract, in which the various items including the plumbing of the stable were discussed in fixing the contract price, and evidence of what was necessary to be done to make the plumbing acceptable to the inspectors. *Hebb v. Welsh*, 335.
  11. In an action against a street railway company for personal injuries, the defendant relied on a document purporting to be a release executed by the plaintiff. The plaintiff testified that she was induced to sign this paper by the fraud of a certain claim agent of the defendant, and was allowed against the objection of the defendant to state the portion of the conversation that she had with this claim agent which occurred after she had signed the paper. Held, that the admission of the evidence was not error, it being part of the conversation during which the paper was signed and having a bearing upon the plaintiff's good faith in alleging fraud. *Keefe v. Norfolk Suburban Street Railway*, 247.
- Party offering instrument showing signs of alteration may be required to explain alteration, see ALTERATION OF INSTRUMENTS, 2.
- Unrecorded deed competent evidence to show what included in later deeds by grantor's heirs conveying generally all their interest in estate of grantor, see DEED, 4.

*Evidence (continued).*

In action against sureties on bond, evidence inadmissible of conversation among defendants before signing not communicated to plaintiff, see *post*, 16, 17.

Evidence admissible to show that defendant signed certain offer and delivered it to attorney for plaintiff on condition that it was to take effect only on certain contingency, see *CONTRACT*, 3.

Extrinsic evidence admissible that grantees in deed were husband and wife taking estate by entireties, see *HUSBAND AND WIFE*, 2.

Evidence of attending circumstances competent in interpreting language of testator giving discretionary power to his widow to expend principal of his estate, see *DEVISE AND LEGACY*, 8.

Course of conduct of parties admissible to show construction of lease only includes parties to lease and not conduct of lessee and of one claiming adversely to lessee whose conduct is not known to lessor, see *LANDLORD AND TENANT*, 6.

*Admissions and Confessions.*

12. In an action of tort for personal injuries, a letter of the plaintiff to the defendant stating the claim and the amount demanded, which does not contain an offer of compromise, is admissible in behalf of the defendant as bearing upon the genuineness and extent of the plaintiff's alleged injuries. *Snow v. New York, etc. Railroad*, 321.

13. One who gives a receipt in writing for money is not estopped to deny that he received the amount named, but, if he does not contradict the terms of the receipt by competent evidence, he will be held to account for the money. *Hudson v. Baker*, 122.

*Construction of admission of counsel.*

14. In an action by the receiver of the property of a fraternal beneficiary corporation for money alleged to have been received by the defendant as treasurer of the corporation and not accounted for by him, it became material to determine whether certain checks drawn by the secretary of the corporation to the order of the defendant should be charged to the defendant in addition to the amounts appearing in the receipts signed by the defendant. The counsel for the plaintiff admitted that the defendant was not liable for a part of the amount covered by the checks, on the express ground that the defendant could not be charged twice for the same debt. An auditor found that the amount of the checks was received by the defendant in addition to the amount shown by the receipts. *Held*, that in view of this finding, the plaintiff's claim was not diminished by the admission of his counsel. *Ibid*.

*Voluntary confession.*

15. At a trial for wilfully and maliciously setting fire to a barn by the burning whereof a dwelling house also was burned, the defendant contended that the presiding judge was not warranted by the evidence on the *voir dire* in admitting a certain confession as voluntary. It appeared, that before the confession a deputy sheriff said to the defendant when four other officers were present "If you are not guilty, don't you think you had better tell the truth?" Whereupon an assistant fire marshal, who had

been questioning the defendant, told him that he offered him no inducement for anything he had a mind to say about the matter, that whatever he said must be of his own free will, and that he offered him "no hope or favor whatever." *Held*, that the judge was warranted in admitting the confession as voluntary. *Commonwealth v. Hudson*, 402.

*Self-serving Statements.*

16. In an action on a bond purporting to guarantee the performance of two contracts annexed to the bond, where the defence is that only one of the contracts was so annexed or referred to, the defendants cannot put in evidence a conversation among themselves before the bond was executed, not communicated to the plaintiff, in which it was agreed that the bond was to guarantee the performance of only one of the contracts and not the other. *Graham v. Middleby*, 349.
17. In an action on a bond purporting to guarantee the performance of two contracts of a corporation annexed to the bond, where the defence is that only one of the contracts was so annexed or referred to, if one of the defendants, who was the treasurer of the corporation, called as a witness by the plaintiff, has testified to the execution and delivery of the bond and contracts, he cannot be asked on cross-examination to testify to a statement made by him to another of the defendants, before the bonds and contracts were delivered to the plaintiff and when the plaintiff was not present, in regard to the subject matter of the contract covered by the guaranty of the bond. *Ibid*.

*Of Exclamations showing Pain.*

18. On the question of the plaintiff's condition alleged to have been caused by a railroad collision, a witness may be asked "What have you observed, if anything, about his suffering from headaches when you have been there?" and can answer that he has seen the plaintiff come out of his room with his hands on his head saying "Oh, Joe, God Almighty, if I could only get rid of these headaches," and the exclamation showing present pain is none the less admissible as such if it also carries an idea of similar past pain, in regard to which it would not be admissible. *Cashin v. New York, etc. Railroad*, 543.

*Of Verbal Act showing Mental Condition.*

19. In an action for injuries caused by a railroad collision, from which the plaintiff was alleged to have suffered mental injury resulting in melancholia, the plaintiff's wife, called as a witness in his behalf, can testify that she heard the plaintiff say that "if he didn't have children he would commit suicide," as a verbal act tending to show the plaintiff's mental condition, there being nothing to show that this was part of a private conversation. *Cashin v. New York, etc. Railroad*, 543.

*Declarations of Deceased Persons.*

20. In an action by a son against the executor under the will of his mother, upon an oral promise alleged to have been made to the plaintiff by his



*Evidence (continued).*

mother to pay to the plaintiff on certain terms the proceeds of certain real estate left by the father of the plaintiff, who died intestate, the defendant, to show that his testatrix had furnished half of the money for the purchase of the real estate in the name of her husband, thus creating a resulting trust, may introduce under R. L. c. 175, § 67, as declarations and conduct of the testatrix, evidence of a conversation between the testatrix and her husband in the presence of the witness, about the amount of the purchase price of the property, and the amounts of money which the husband and wife put into it. If it appears that in settling her husband's estate the testatrix never claimed a resulting trust, this affects merely the weight of the evidence as to her declarations but not its admissibility. *Cogswell v. Hall*, 455.

*Testimony of Husband or Wife in Criminal Case.*

21. Under R. L. c. 175, § 20, either a husband or a wife can testify against the other in a criminal proceeding, if the one testifying is willing to do so. *Commonwealth v. Barker*, 324.
22. In a criminal case in which the defence is insanity, the wife of the defendant is prohibited by R. L. c. 175, § 20, cl. 1, from testifying to a private conversation in which the defendant told her that he would drown himself, although the statement thus excluded is relevant to show the defendant's state of mind. *Commonwealth v. Cronin*, 96.

*Proof of Foreign Law.*

No presumption in absence of evidence that statutes of another State are like those of this Commonwealth, see *ante*, 1.

*Ancient Deeds.*

23. Where it is shown that a deed, dated in 1776, was found in the possession of an heir of one of the grantees, and various records of the Probate Court tend to show that the possession and claim of title of the parties to the deed was for a long time in conformity with it, the deed may be admitted in evidence without formal proof of its execution. *Butrick, petitioner*, 107.

*Records.*

24. Books kept in a hospital containing entries made in regard to the cases treated there are not public records, not being kept under any requirement of law, and where it is not shown that the person who made the entries is dead or cannot be produced such books are not admissible in evidence, especially if it does not appear that they are complete and perfect records. *Cashin v. New York, etc. Railroad*, 543.

## EXECUTOR AND ADMINISTRATOR.

*Appointment.*

1. In R. L. c. 187, § 8, designating the cases in which an administrator *de bonis non* may be appointed, the debts "remaining due from the estate" which the statute makes the occasion for such an appointment are debts

enforceable against the estate, and a debt barred by the special statute of limitations gives no cause for the appointment, unless there are equitable considerations which bring the case within R. L. c. 141, § 10. *Hubbard, petitioner*, 22.

*Accounts of.*

2. St. 1889, c. 311, providing, that after any account of an executor, trustee or other person required by law to render an account in the Probate Court, has been filed, the judge of that court may, "before approving the same," appoint one or more auditors, authorizes the appointment of an auditor to report upon accounts of an executor previously approved by the judge, upon an application by the beneficiaries to reopen those accounts, made before the executor's final account has been allowed. *Brigham v. Morgan*, 27.
3. An assent in writing by the beneficiaries of an estate to the allowance of a series of accounts, filed by two executors before their final account, does not operate as a ratification of improper investments stated in the accounts, if the accounts were not true, containing misrepresentations wilful on the part of one of the executors and which the other executor did not know to be true. *Ibid.*

*Investment by.*

4. An expenditure by executors, from the funds of an estate, of \$80,000 in two years, in an attempt to develop a tract of vacant land upon the outskirts of a city in a distant State, appraised at only \$12,000, resulting in a net loss of \$40,000 at the end of three months after the two years, rightly is disallowed as an investment, even if the money had been lying in the hands of the executors uninvested and the executors would have been justified in temporarily investing it. *Brigham v. Morgan*, 27.
  5. On the issue of disallowing in an executor's account the expenditure of a large sum of money in attempting to develop a tract of vacant land upon the outskirts of a city in a distant State, no exception lies to the exclusion of evidence, that men of prudence, discretion and intelligence in the East, especially in Boston, as well as conservative institutions for savings, were making investments similar to that in question. *Ibid.*
  6. In an account of an executor, an investment properly is disallowed of \$2,500 from the funds of the estate, made by depositing that amount with a loan and trust company organized in a distant State upon the understanding that an unsecured debenture bond should be issued for the deposit, where the trust company has failed and the bond is of no value. *Ibid.*
- Oral directions by testator.
7. Even if oral directions, given by a testator in his lifetime to one who is expected to act as his executor, ever will justify that person when appointed executor in making an expenditure otherwise improper, yet if in giving such oral directions the testator stated that he had made arrangements in his will, he must be understood to have referred to that instrument as the guide, and unless the will provides otherwise the executor will be held to the liabilities imposed upon him by the general law. *Ibid.*

Executor and Administrator (*continued*).

Liability for interest on loss.

8. Where executors are found to have acted in bad faith in making an improper investment of the funds of the estate, it is right to charge them with interest at the rate of six per cent upon the amount of the loss on the investment. *Brigham v. Morgan*, 27.

Executrix under will of her husband held on facts of case not to be responsible for debts incurred by her son in carrying on his own business in name of estate, see AGENCY, 2.

Liability of surety on administrator's bond not fixed until judgment obtained against estate and administrator fails to pay it on demand, see INSOLVENCY.

#### FALL RIVER.

Under St. 1902, c. 393, board of aldermen and not mayor have charge of construction of sewers and sidewalks and of specific repairs of streets, see MUNICIPAL CORPORATIONS, 5-7.

#### FIXTURES.

Under R. L. c. 12, §§ 58, 59, machinery of manufacturing corporation to be taxed as personal property, see TAX, 3.

#### FLATS.

St. 1893, c. 334, extending time within which proprietors of certain property on Mystic River could complete improvements authorized by statute, extended time within which they could fill flats without making compensation for displacement of tide water, see TIDE WATER.

#### FRATERNAL BENEFICIARY ASSOCIATION.

Treasurer and secretary of fraternal beneficiary corporation jointly liable for money of corporation wrongfully appropriated by secretary and not collected from him by treasurer, see JOINT TORTFEASORS.

#### FRAUD.

Fact that one taking accommodation note agrees not to sell it to A. and takes it to A. who lends money to B. with which B. purchases it, does not show that note was put into circulation fraudulently, see BILLS AND NOTES, 2. Whole conversation between parties both before and after signing of release alleged to have been obtained by fraud held admissible, see EVIDENCE, 11.

#### GARDNER.

Under St. 1882, c. 145, town of Gardner bound to pay Gardner Water Company fair value of right to use and sell waters of Crystal Lake for purpose of furnishing inhabitants of town with water, see GREAT POND, 2.

## GIFT.

Conveyance of property by wife to trustee, with life interest in donor and remainder over, held valid although made for purpose of preventing husband from sharing in distribution of property on her death, see HUSBAND AND WIFE, 5.

## GOOD WILL.

Essentials of, to constitute asset in accounting between partners on dissolution, see PARTNERSHIP, 4, 5.

## GRADE CROSSING ACTS.

*Procedure.*

1. If a petitioner for damages, under an act providing for the abolition of a grade crossing, has a ground for equitable relief, he has no right to have the petition in the original proceedings for the abolition of the grade crossing amended by inserting the substance of his petition in it. His proper course would be to file a petition as intervenor in the grade crossing proceedings. *Lancy v. Boston*, 219.

*Notice of Taking.*

2. In a taking of land under an act providing for the abolition of a grade crossing, if the provisions of the statute are complied with by proceedings in court, it is immaterial whether the landowner had in fact any notice or knowledge that his land was taken. *Lancy v. Boston*, 219.

*Interest on Money Borrowed not "Cost incurred."*

3. Under St. 1892, c. 433, a special act providing for the abolition of certain grade crossings, which was made subject to the provisions of St. 1890, c. 428, §§ 1-8, so far as they did not conflict with its provisions, the Old Colony Railroad Company, which was compelled to hire money to meet the obligations imposed by the special act, is not entitled to have the interest paid by it for such money allowed as part of the "expenses" of the alterations and improvements to be paid by the railroad company of which the Commonwealth is to repay forty-five per cent of the "cost incurred." *Old Colony Railroad, petitioner*, 160.

*Apportionment of Cost.*

4. By St. 1901, c. 205, the East Taunton Street Railway Company was authorized to intervene in proceedings then pending for the abolition of certain grade crossings in Taunton, and it was provided that if the commissioners appointed in those proceedings should decide that the abolition of the grade crossing on Middleborough Avenue and Richmond Street was necessary, the street railway company should pay such part of the total cost of the abolition of the crossing on Middleborough Avenue as the commissioners should find to be just and equitable, and should prescribe in their report. The commissioners determined that it was just and equita-

ble that the street railway company should pay twenty-five per cent of this cost, and so prescribed in their report. By order of the commissioners Middleborough Avenue was carried by a bridge over the tracks of the Old Colony Railroad Company, the part of Richmond Street at the previous grade crossing was discontinued, and a new way was substituted for it which entered Middleborough Avenue at a point convenient for crossing the railroad on the bridge constructed on that avenue. The street railway company contended that for this reason only one half the cost of the bridge should be charged on account of Middleborough Avenue and that the other half should be charged on account of Richmond Street. *Held*, that the action of the commissioners was authorized directly by the statute, and that they had a right to treat all the cost of the bridge as belonging to Middleborough Avenue. *Mayor & Aldermen of Taunton, petitioners*, 199.

#### GREAT POND.

1. The Legislature has power to give to a private corporation the right to use and sell the waters of a great pond in supplying the inhabitants of a town with water. *Gardner Water Co. v. Gardner*, 190.
2. The Gardner Water Company was granted by St. 1882, c. 145, the right to take the waters of Crystal Lake, a great pond, and by § 9 of that act the town of Gardner was given the right to purchase the corporate property and all the rights and privileges of the Gardner Water Company at a price to be fixed by commissioners if the corporation and the town were unable to agree. The town having exercised its option of purchase, commissioners appointed under that section, ruled, that the corporation was entitled to the fair value, at the time of the exercise of the option, of the right to use and sell the waters of Crystal Lake for the purpose of furnishing the inhabitants of the town with water. *Held*, that the ruling was correct. *Ibid*.

#### GUARANTY.

1. A guaranty under seal of the performance of the covenants of a lease needs no consideration and is binding although executed after the lease was made. *Roth v. Adams*, 341.
2. If a guaranty of the performance of the covenants of a lease contains no stipulation that the lessor shall obtain judgment against the lessee before demanding payment of the guarantor, such a requirement will not be implied. *Ibid*.
3. Under an absolute guaranty of the performance of the covenants of a lease the guarantor is entitled to no notice of the default of the lessee. *Ibid*.

Guarantor of performance of covenants of lease cannot set up defence not open to lessee, see LANDLORD AND TENANT, 8.

In action on bond guaranteeing performance of contract by corporation, of which defendants are directors, plaintiff need not show notice to defendants of default of corporation, see BOND, 2.

As to liability of sureties on bond of defaulting collector of taxes, see SURETY, 1-8.

In action against surety on bond to dissolve attachment, defendant estopped to allege attachment invalid. No defence that plaintiff has not exhausted other remedies and has not realized on collateral security, see SURETY, 9, 10.

#### HUSBAND AND WIFE.

1. A deed to husband and wife executed before the enactment of St. 1885, c. 237, conveys an estate by entireties, which passes to the survivor. *McLaughlin v. Rice*, 212.
2. It may be shown by extrinsic evidence, that a man and woman, named as grantees in a deed, were husband and wife when the deed was executed, before 1885, and therefore took an estate by entireties. *Ibid*.
3. A husband cannot acquire by prescription a right of way over land of his wife who is living with him on adjoining land of his own. *Graves v. Broughton*, 174.
4. The signature of a married woman on the back of a promissory note payable to her husband is absolutely void, whether written before or after delivery and whether she signed as a joint maker or as an indorser or guarantor. *National Bank of the Republic v. Delano*, 424.
5. A married woman may make a present conveyance of all her personal property to a trustee, retaining a beneficial interest during her life, with a gift over upon her death, subject to be varied by appointment during her lifetime upon giving notice in writing to the trustee, and such a conveyance is not invalid if made for the purpose of preventing the husband of the donor from sharing in the distribution of the property upon her death. *Kelley v. Snow*, 288.

Consent by husband to will of wife does not extend to codicil substantially changing will although leaving provision for husband unchanged, see WILL, 1.

Under R. L. c. 175, § 20, either husband or wife can testify against other in criminal proceeding if one testifying is willing to do so, see EVIDENCE, 21. In criminal case wife cannot testify to statement of husband in private conversation which otherwise would be admissible as evidence of insanity, see EVIDENCE, 22.

#### ICE.

As to rights of tenant at will in uncut ice on artificial pond, see LANDLORD AND TENANT, 2.

#### INSOLVENCY.

*Discharge when a Bar.*

Debt "absolutely due."

Under Pub. Sts. c. 157, § 26, (R. L. c. 163, § 31,) a judgment against an administrator on a debt due from the estate, on which no demand for payment has been made upon the administrator, is not a debt "absolutely due" from a surety on the administrator's bond, and therefore a dis-

charge in insolvency of the surety is no bar to an action against him brought on the administrator's bond by the judgment creditor, where the administrator has committed a breach of his bond by failing to administer the estate according to law, but where no demand for the payment of the judgment had been made on the administrator at the time of the first publication of the notice of the issuing of the warrant in insolvency. *McIntire v. Cottrell*, 178.

## INSURANCE.

### *Fire.*

1. A contract for insurance against fire, in the form prescribed by our statute, is a contract of indemnity, and the insured is only entitled to be put in the same condition pecuniarily in which he would have been had there been no fire. *Tabbut v. American Ins. Co.* 419.
2. Under a policy against fire in the Massachusetts standard form, one who has paid certain instalments on a conditional contract for the purchase of a chattel, the title to which is not to pass until all payments have been made, if the chattel is destroyed by fire, cannot recover the value of the chattel at the time of the loss, but, in the absence of proof of other damage, can recover only the amount of the instalments he has paid, that being the measure of his insurable interest. *Ibid.*

### *Life.*

Who can sue.

3. Under St. 1894, c. 522, § 73, (R. L. c. 118, § 73,) the beneficiary of a policy of life insurance issued before April 11, 1894, cannot sue on the policy in his own name, and a policy taken out by the assured before that date, if otherwise valid, is none the less so for want of an insurable interest on the part of the beneficiary. *King v. Cram*, 103.
4. A life insurance policy, issued after April 11, 1894, was made payable to the wife of the insured, if living, otherwise to the legal representatives of the insured, upon the receipt by the insurance company and its approval of proofs of death of the insured. The wife of the insured survived him and submitted proofs of death, but died two days later. The proofs of death had not been acted on by the company, which furnished an additional blank to be filled out by the attending physician of the insured. The administrator of the widow procured and delivered the required certificate, and sued on the policy. *Held*, that the right of action had vested in the widow and passed to her administrator. *Emerson v. Metropolitan Life Ins. Co.* 318.

Validity of assignment.

5. In the absence of evidence of a gambling contract, it is not necessary to the validity of an assignment of a policy of life insurance that the assignee should have an insurable interest in the life of the assured. *King v. Cram*, 103.
- One voluntarily assigning policy of insurance on his own life cannot have it cancelled in equity on ground that assignee has no insurable interest in his life, see ASSIGNMENT, 2.

**Waiver of forfeiture.**

6. If a policy of life insurance by its terms becomes void on a failure to pay premiums at maturity, and provides that no agent can extend the time for payment of premiums and that the contract cannot be altered except by the written agreement of the company signed by one of certain officers named, yet, if the company accepts payment of premiums after they are due, the lapse of the policy for failure to pay the premiums is waived. *White v. McPeck*, 451.

*Quere*, whether insured is unsound in health as matter of law if subject to fits or bad spells or loss of consciousness, see **PRACTICE, CIVIL**, 22.

Premiums on partners' policies are partnership debts where partnership agreement provides that policy on life of each shall be made payable to other partner and be kept in force, see **PARTNERSHIP**, 1.

*Accident.*

7. Under an accident insurance policy insuring a cotton manufacturer against injuries not caused by "voluntary exposure to unnecessary danger" the assured cannot recover for an injury received while riding in an amateur steeple chase. *Semble*, otherwise of an injury incurred while engaged in an ordinary sport or amusement. *Smith v. Aetna Life Ins. Co.* 74.

**INTEREST.**

Lapse of time between accruing of cause of action and verdict may be considered in assessing damages in action of tort, see **DAMAGES**, 9.

Money ordered by decree in equity to be paid as damages bears interest from date of decree although sum is made up in part of interest, see **EQUITY PLEADING AND PRACTICE**, 12.

Executor acting in bad faith in making improper investment of funds of estate chargeable with interest at six per cent on amount of loss, see **EXECUTOR AND ADMINISTRATOR**, 8.

Partnership agreement for interest on capital furnished by partners does not entitle them to interest after dissolution, before balance found due and before reasonable time for winding up affairs of firm has elapsed, see **PARTNERSHIP**, 8.

**INTOXICATING LIQUORS.***What is Intoxicating.*

1. By R. L. c. 100, § 2, cider is an intoxicating liquor within the meaning of that chapter without being shown to contain more than one per cent of alcohol. *Commonwealth v. McGrath*, 1.

*Sale of Cider.*

2. On the trial of a complaint under R. L. c. 100, §§ 1, 2, for maintaining a certain tenement for the illegal sale and illegal keeping of intoxicating liquors, there was evidence that the defendant kept a grocery and had sold cider there without a license during the time covered by the complaint.



*Intoxicating Liquors (continued).*

The judge instructed the jury, that if they found this to be the fact the defendant would be guilty of the offence charged, "as the sale of all cider, unless under a license, is prohibited by law in this Commonwealth." *Held*, that the first part of the instruction was correct, and that the reason given in the portion quoted, although stated too broadly, did the defendant no harm, as he did not come within the valid exceptions of R. L. c. 100, § 1. St. 1903, c. 460, was not then in force. *Commonwealth v. McGrath*, 1.

*Criminal Liability of Expressman.*

3. Under R. L. c. 100, § 50, an expressman who brings intoxicating liquors into a no license city or town, is liable to prosecution, if he transports the liquors to the place of actual delivery without first having entered in the book required by the statute the date of the reception of the liquors by him and a transcript of the marks required by § 49 of the same chapter. *Commonwealth v. Shea*, 89.

## JOINT TENANTS AND TENANTS IN COMMON.

Deed to husband and wife before St. 1885, c. 237, conveys estate by entireties. Extrinsic evidence that grantees were husband and wife is admissible, see HUSBAND AND WIFE, 1, 2.

## JOINT TORTFEASORS.

In an action by the receiver of the property of a fraternal beneficiary corporation for money alleged to have been received by the defendant as treasurer of the corporation and not accounted for by him, it appeared, that the secretary of the corporation held the receipt of the defendant for a certain sum of money with which the defendant had charged himself by mistake, as this money had not been paid by the secretary to the defendant although it was the defendant's duty to have collected it from him. It further appeared that the money in question had been paid by the secretary to the plaintiff as part of a suspense fund representing money of the corporation wrongfully appropriated by the secretary, and that under the by-laws of the corporation the secretary was primarily liable to account for the money in question, but that the plaintiff had received it with the understanding that if the defendant was liable for this sum the secretary should not be made to pay it. *Held*, that the fact that the secretary also was liable for the money did not relieve the defendant from his liability in this action at law, it having been the defendant's duty to collect and account for the money. *Seemle*, however, that the plaintiff as receiver holding this money as an officer of the court, the defendant might file a petition in the suit in equity in which the receiver was appointed, for an adjustment of the equities of the parties as to this portion of the fund. *Hudson v. Baker*, 122.

Corporation negligently charging highway of city with electricity not joint tortfeasor with city negligently suffering highway to remain thus charged, see WAY, 8.

Where lessee of chattels sells them without authority, lessee and purchaser properly may be joined as defendants in suit in equity in nature of trover, see EQUITY PLEADING AND PRACTICE, 2.

### JUDGMENT.

#### *As to what Matters conclusive.*

1. A judgment, in reference to collateral rights of the parties not necessarily included in the action, is conclusive only as to matters which were put in issue and adjudicated. *Butrick, petitioner*, 107.

#### *On whom conclusive.*

2. In proceedings upon a petition for partition, where there were a number of petitioners and a number of respondents, it appeared, that all the petitioners but one had brought a writ of entry against one of the respondents. *Held*, that the petitioner who was not a party to the writ of entry could not avail himself of a judgment upon it, but that the judgment was conclusive between all the other petitioners and that respondent who was the tenant in the real action. *Butrick, petitioner*, 107.

#### *Of Court of another State.*

3. When one is sued here on a judgment obtained in another State, the defences open to him are to be determined by the law of this Commonwealth and not by the law of the State in which the judgment was obtained. *Chicago Title & Trust Co. v. Smith*, 363.
4. In an action here on a judgment obtained in another State the defendant may plead and prove in defence that he was not served with process and did not authorize an appearance in his behalf in the action in which the judgment was obtained, and the fact, that the defendant was a citizen of the State where the judgment was obtained when the action there was brought, is immaterial. *Ibid*.

Statement in agreed statement of facts, that court of another State made decree purporting to dissolve corporation of that State does not require inference that corporation was dissolved, see PRACTICE, CIVIL, 6.

#### *Set-off.*

As to right under R. L. c. 170, § 2, to set off judgment by cross action against non-resident plaintiff, see PRACTICE, CIVIL, 13, 14.

### JURISDICTION.

Plain and adequate remedy for compensation for taking of land for public use provided by statute authorizing the taking is exclusive, see DAMAGES, 2.

For equity jurisdiction, see that title.

### JUSTICE OF THE PEACE.

No power in taking deposition to commit deponent to jail for contempt in refusing to answer proper question, see DEPOSITION, 1.

## LANDLORD AND TENANT.

*Evidence of Tenancy at Will.*

1. Conversations between the owner of land and one claiming to be a tenant at will of the land are admissible for the purpose of showing the existence of the tenancy at will and what is included by its terms, and it is no objection to the admission of such evidence that it tends to vary the terms of a lease from the owner of the land to another person claiming adversely to the alleged tenant at will. *Walker Ice Co. v. American Steel & Wire Co.* 463.

*Oral Grant of Easement to Tenant at Will in connection with adjoining Land.*

2. The owner of an artificial pond, which he has leased to a manufacturing company with the exclusive right to store and use water there at its natural temperature, reserving the exclusive right to cut ice from the pond as used in connection with certain land and buildings owned by him adjoining the pond, may give orally to a tenant at will, holding over after the expiration of a lease in writing of the land and buildings and the right to cut ice in connection therewith, all the rights which he has enjoyed under his lease, and in such case the tenant at will has not a mere license to cut ice but a property right in the ice before it is cut, and may maintain an action against the manufacturing company for destroying an uncut crop of ice by turning into the pond hot water from its condensers. *LORING, HAMMOND, & BRALEY, JJ. dissenting. Walker Ice Co. v. American Steel & Wire Co.* 463.

*Construction of Lease.*

As to right to store water in pond.

3. A lease to a manufacturing company, operating a steam plant, of an artificial pond "to be used for flowage purposes only . . . with the exclusive right to flow, store and use water in said pond" to a certain height, reserving the exclusive right to cut and sell ice from the pond, grants only the right to store and use the water in its natural condition, and does not give the lessee the right to turn into the pond hot water from its condensers and store it there so as to melt the ice, although this may be reasonably necessary for the proper operation of its steam plant. *LORING, HAMMOND, & BRALEY, JJ. dissenting on the ground that, if the evidence shows that the right to turn hot water into the pond is necessary to keep the steam plant in operation, such a right is included in the grant, and that the exclusion of evidence tending to show this fact is erroneous. Walker Ice Co. v. American Steel & Wire Co.* 463.

Agreement to furnish additional steam if without extra expense.

4. A lease of a portion of a building to a manufacturer of confectionery included the use of steam for heating and for power, providing for an additional payment at a certain rate if more than three horse power was furnished. It further was provided, that the lessee should have the "privilege to connect a pipe to the steam supply pipe to draw steam for use in the confectionery or in his business, when steam is in the supply

pipe, provided same can be done without extra expense to lessor, or those representing her, either for making changes or for supplying steam." At the request of the lessee the engineer of the lessor connected the cooking apparatus of the lessee with the pipe carrying the live steam from the boiler to the engine, the lessee understanding that this was the connection to which he was entitled under the provision of the lease. For more than four years monthly rent bills were presented and paid with no demand of payment for cooking steam. Thereafter upon a close examination of the steam pipes, the lessor discovered that the steam supplied for cooking had caused extra expense, and brought an action for compensation for the steam furnished for cooking during the period of the lease. It was found as a fact that the plaintiff by the exercise of reasonable care could have known the facts about the connection and the use. *Held*, that the meaning of the clause of the lease was that the defendant should be entitled to have furnished for cooking purposes steam, which in relation to the entire plant and the defendant's business, should be of no considerable cost to the plaintiff, that this was a matter peculiarly within the knowledge of the plaintiff, that the defendant was entitled to notice that a charge was to be made for the steam, and that the plaintiff could not recover for steam furnished for cooking purposes before such notice was given. *Smith v. Wenz*, 229.

As to effect of election to purchase.

5. A written lease for the term of three years contained the following provision: "With the right and privilege of said lessees at any time on or before the expiration of this lease to purchase the above described leased premises for the sum of twenty-six hundred dollars; and the said lessor hereby binds himself to give unto the said lessees a good and sufficient deed of said leased premises upon the tender of said amount at any time as aforesaid; and if the said lessees shall elect to purchase said premises at any time during the continuance of this lease, then, and in that event, all moneys which shall have been paid as rent as hereinafter provided shall be deemed and considered as paid on account for the purchase of said premises and applied in part payment of said sum of twenty-six hundred dollars." *Held*, that, by giving a notice of their election to purchase, the lessees did not acquire a right to occupy the premises free of rent for three years, but, to exercise their option, must tender the \$2,600 and demand a deed within a reasonable time after notifying the lessor of their intention to purchase. *Hill v. Allen*, 25.

Course of conduct of parties.

6. Evidence of the course of conduct of the parties to a lease admissible to show the construction put upon it by them is confined to the conduct of the lessor and lessee and those claiming under them, and does not include evidence of the conduct of the lessee and of one claiming a right adverse to the lessee as tenant at will of the lessor, where it does not appear that the lessee was acting under a claim of right or that such a claim was acquiesced in by the lessor or that the lessor knew of the conduct of the lessee. *Walker Ice Co. v. American Steel & Wire Co.* 463.

*Action for Rent.*

Tenant when estopped from setting up eviction.

7. A lessee of buildings, who remains in possession and use of them until the end of the term demised, cannot when sued for the rent set up eviction or a breach of the covenant for quiet enjoyment on the ground that the premises have been condemned by the board of health as dangerous and unfit for habitation. *Roth v. Adams*, 841.

Decay of buildings no defence.

8. Where a lessor of real estate does not agree to make repairs, the lessee, in the absence of evidence of fraud or concealment, cannot set up the decay and dilapidation of the leased buildings in defence to an action for rent. Nor is such a defence open to a guarantor of the performance of the covenants of the lease. *Ibid*.

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In suit in equity to relieve against forfeiture of lease for non-payment of taxes lessee must show that non-payment was due to accident or mistake, and cannot contend that there was no forfeiture. *Quære* whether he may attack forfeiture at law and if unsuccessful seek relief from it in equity, see EQUITY JURISDICTION, 6-8.

Guaranty under seal of performance of covenants of lease needs no consideration and is binding though executed after making of lease. Guarantor is entitled to no notice of default, and lessor need not obtain judgment against lessee before demanding payment of guarantor, see GUARANTY, 1-8.

## LIBEL AND SLANDER.

*Words spoken in Course of Judicial Proceedings.*

Words used in a complaint made to a magistrate having jurisdiction to receive it, and in testimony given before a court of competent jurisdiction on the trial of the complaint, are spoken in the course of judicial proceedings, and, if pertinent to the matter in hearing, are absolutely privileged even if uttered maliciously. *Laing v. Mitten*, 233.

## LICENSE.

Issuing of dog license not evidence that licensee was owner unless it is shown by whom fee paid or at whose request license issued, see DOG.

Proof of compliance with terms of license for storage of naphtha issued under R. L. c. 102, §§ 114, 115, is defence to indictment for maintaining nuisance by such storage, see NUISANCE, 2.

## LIMITATIONS, STATUTE OF.

Court has no jurisdiction of petition for damages brought after time limited by statute, see DAMAGES, 1.

Rights under certain agreement not under seal relating to restrictions on land barred in six years, see EQUITABLE RESTRICTION, 6.

Fact that new action for cause stated in proposed amendment to declaration would be barred by special statute of limitations is reason for allowing amendment, see PRACTICE, CIVIL, 3.

Debt barred by statute not debt "remaining due from the estate" as ground for appointment of *administrator de bonis non* under R. L. c. 137, § 8, unless there are equitable considerations bringing the case within R. L. c. 141, § 10, see EXECUTOR AND ADMINISTRATOR, 1.

### LORD'S DAY.

Under R. L. c. 98, § 2, a religious or charitable society lawfully may give a public vaudeville entertainment on the Lord's day if the excess of the receipts over the expenses is to be devoted exclusively to a charitable or religious purpose, the word "proceeds" as used in the statute meaning the net returns of the entertainment after the payment of necessary expenses. *Commonwealth v. Alexander*, 551.

### MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, if it appears that the defendant started a prosecution resulting in the arrest of the plaintiff, the defendant, although not liable for any acts of the arresting officer done in excess of the authority conferred by his warrant, may be held liable for everything done within such authority, whether the officer acted with the greatest possible consideration toward the plaintiff or not. *Laing v. Mitten*, 233.
2. In an action for malicious prosecution the judge in substance told the jury, that the burden was upon the plaintiff to prove that in instituting criminal proceedings the defendant acted maliciously and without probable cause, and that upon the question of probable cause the jury were not to take into consideration the fact of acquittal, but were "to deal with the case as though it were new" before them, "and say whether there was a probable cause for it under all the circumstances." *Held*, that this portion of the charge was sufficiently favorable to the defendant. *Ibid*.
3. In an action for malicious prosecution the judge in his charge at first told the jury that the defendant, if they found against him, was to be held liable for all the results of the prosecution "no matter what happened", but subsequently corrected this statement by a direction to hold the defendant liable only for that "which would naturally arise from the service of the process or which naturally might be expected" to happen as "the natural consequence of the service of the process." *Held*, that this gave the defendant no ground for exception. *Ibid*.

### MASTER AND SERVANT.

An expert workman in the employ of a machinery company, furnished by that company to the proprietors of a power plant to make repairs on their machinery under the direction and control of their superintendent, is while engaged in this work the servant of the proprietors and the fellow servant

**Master and Servant (continued).**

of an engineer in their employ, and cannot recover from the proprietors for personal injuries caused by the negligence of the engineer. *Delory v. Blodgett*, 126.

As to evidence of negligence of employer in employing engineer who had been known to drink intoxicating liquor, see NEGLIGENCE, 23.

Cases relating to master's liability to third person for negligence of servant, and his liability to servant for injuries received in his employ, will be found under the various sub-titles of NEGLIGENCE.

**MERCHANDISE IN BULK.**

Regulation of sales of, by St. 1903, c. 415, constitutional, see CONSTITUTIONAL LAW, 2.

**METROPOLITAN PARK ACT.**

1. The provision of § 5 of the metropolitan park commission act, St. 1894, c. 288, that damages sustained by the taking of land or any right therein under the act shall be "assessed by a jury of the Superior Court in the same manner as is provided by law with respect to damages sustained by reason of the laying out of ways" refers only to the mode of procedure and not to the elements of damage for which recovery may be had. *McSweeney v. Commonwealth*, 371.
2. Under § 5 of the metropolitan park act, St. 1894, c. 288, providing for the payment of all damages sustained by the taking of land or any right therein under the act, the owner of land not taken cannot recover for temporary injury to his land by the accumulation of water caused by the taking of adjoining land for a parkway. *Ibid.*

**METROPOLITAN WATER SUPPLY ACT.**

1. On a petition under St. 1895, c. 488, § 14, to determine the damages suffered by the owner on April 1, 1895, of an established business on land in the town of West Boylston decreased in value by the carrying out of that act, the damages should be based upon the business shown to exist on April 1, 1895, and should not be assessed as of the time of the passage of the act or of the filing of the taking of the water. *Sawyer v. Commonwealth*, 356.
  2. The provision of § 14 of the metropolitan water supply act, St. 1895, c. 488, that in the assessment of damages thereunder "interest may be included in such damages and in such value at such rate and for such time as the commission may deem just and equitable", applies to the assessment of damages for decrease in the value of a business as well as to other assessments under that section. *Ibid.*
- Proper form of report of commissioners appointed under St. 1895, c. 488, § 14, see PRACTICE, CIVIL, 10.
- Regulation of pollution of stream whose waters are taken under St. 1895, c. 488, and compensation to riparian owner having prescriptive right of pollution, see CONSTITUTIONAL LAW, 1, 4.

## MILTON ACADEMY.

What real estate of Trustees of Milton Academy exempted from taxation, see **Tax**, 8.

## MORTGAGE.

*Of Real Estate.*

Tax on, how assessed, see **Tax**, 5.

Right of assignee under unrecorded assignment of mortgage to redeem from tax sale, see **Tax**, 15-18.

## MUNICIPAL CORPORATIONS.

*Election of Selectmen.*

1. Under St. 1898, c. 548, §§ 335, 336, 361, a town, which has adopted the use of official ballots for the election of town officers, may, at a meeting held more than thirty days before the next annual meeting, vote to abandon the method of electing selectmen provided by § 335, theretofore adopted by the town, and return to its former method of electing annually three selectmen to serve for one year. *Attorney General v. Hutchinson*, 85.

*Contract for Waterworks.*

2. Neither the water commissioners of a town, as its agents, nor the town itself by a vote, can make a binding contract on behalf of the town to take water from an unauthorized source. *Smith v. Stoughton*, 329.
3. St. 1886, c. 240, created the Stoughton Water Company. By § 2 the corporation was authorized to take the waters of Knowles' Brook. By § 10 the town of Stoughton was authorized to purchase the franchise, corporate property and rights of the corporation. This it did. Thereafter the town made a contract in writing for a supply of water from wells to be driven below the sources of Knowles' Brook and independent of them. *Held*, that the contract was not binding on the town, because it provided for the construction of waterworks in connection with a supply which the town had no legal authority to use. *Stoughton v. Paul*, 173 Mass. 148, explained. *Ibid*.

*Remedy to restrain Mayor from Illegal Expenditure.*

4. A petition of not less than ten taxable inhabitants, under R. L. c. 25, § 100, is the proper remedy to restrain the mayor of a city from expending money or incurring obligations in behalf of the city for the construction of certain sewers and sidewalks and the paving of certain highways, ordered by the mayor in excess of his authority. *Draper v. Mayor of Fall River*, 142.

*Respective Powers of Mayor and Aldermen of Fall River.*

5. Under the revised charter of the city of Fall River, St. 1902, c. 393, the mayor of that city has no authority to order the construction of a sewer without a previous adjudication by the board of aldermen. The fact,



**Municipal Corporations (continued).**

that an appropriation has been made in general terms for sewer construction and that the superintendent of streets has been authorized to expend it under the general control and supervision of the mayor, does not give the mayor authority to construct a sewer without an adjudication by the board of aldermen that it is necessary for the public health or convenience. *Draper v. Mayor of Fall River*, 142.

6. Under the revised charter of the city of Fall River, St. 1902, c. 393, the board of aldermen, as successors of the mayor and aldermen, have charge of the construction of sidewalks including the laying of curbstones, but if in a particular case the aldermen neglect to order curbing to be laid where it is necessary to render a street safe and convenient for travel, the mayor may direct the superintendent of streets to lay the curbing, or the surveyor of highways may lay it of his own motion. *Ibid.*
7. Changing the surface of Durfee Street in Fall River from macadam to granite block paving, and the surface of Granite Street in the same city from cobblestones to a brick pavement, were held to be specific repairs which must be authorized by the board of aldermen under the revised charter of that city, St. 1902, c. 393, as distinguished from ordinary repairs of an administrative nature which might be ordered by the mayor to be made by the superintendent of streets. *Ibid.*

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Duty of town operating electric light plant to inspect its poles, and liability to lineman injured by fall of rotten pole, see NEGLIGENCE, 28.

For questions arising on action by town on bond of defaulting collector of taxes, see SURETY, 1-8.

**MYSTIC RIVER.**

St. 1893, c. 334, extending time within which proprietors of certain property on Mystic River could complete improvements authorized by statute, extended time within which they could fill flats without making compensation for displacement of tide water, see TIDE WATER.

**NAPHTHA.**

Indictment charging storage of naphtha emitting unwholesome smells held good as indictment at common law for maintaining nuisance. Proof of compliance with terms of license under R. L. c. 102, §§ 114, 115, defence to such indictment, see NUISANCE, 1, 2.

**NEGLIGENCE.***Contributory Negligence and Due Care.*

1. Whether a lineman in the employ of a telephone and telegraph company, when at work on a pole of his employer, is negligent in not examining a pin inserted in the pole before trusting his weight to it, is a question of fact for the jury, and this is none the less so by reason of a rule requiring linemen to test the poles and pins, if they thought there was danger, and if they found any loose pins to pull them out and report to the foreman,

- if it does not appear that the pin in question was loose or that the lineman thought there was danger. *Chisholm v. New England Tel. & Tel. Co.* 82.
- Of workman engaged in setting telephone poles, injured by allowing his hands to be drawn into snatch block of derrick while grasping rope, see *post*, 25.
- Of employee injured by defective hoisting apparatus, see *post*, 16, 18.
- Of machinist stepping over revolving shaft, see *post*, 22.
- Of one driving horse over wall near highway on dark night, see *WAY*, 5.
- Of one driving team upon track of street railway to avoid post of elevated structure, see *post*, 13.
- Of one run over by street car while in such stupor that shaking and kicking him does not wake him, see *STREET RAILWAY*, 5.
- Person sitting by and trusting to driver of team, if injured by negligence of another, can recover if driver was in exercise of due care, see *post*, 14.
- To recover from street railway company under St. 1886, c. 140, for loss of life, plaintiff must show that testator or intestate was in active actual exercise of due care, see *STREET RAILWAY*, 4.
- Failure to look and listen before crossing track of electric street railway may be conclusive evidence of negligence, and as to negligence of woman stepping on track in front of approaching car ten feet distant, see *post*, 7, 8.
- On issue of due care of plaintiff's intestate in driving, admission of evidence that some time before accident team went by witness rapidly is within discretion of judge, see *WAY*, 6.

*Proximate Cause.*

2. If a street railway company leaves a large reel, which has been used for holding wire, lying on its side in a secure position on the grass within the limits of a highway but outside of the travelled portion, thus violating a town by-law, and children, passing along the street on their way to school, take the reel from the place where it has been left and roll it down the street so that it strikes a carriage, throwing out and injuring a woman, the railway company is not liable for the injuries thus caused, because, assuming that leaving the reel in the highway is evidence of negligence, such negligence is the remote and not the direct and proximate cause of the injury. *Glassey v. Worcester Consolidated Street Railway*, 315.

*Liability to Trespasser.*

3. In an action against a railroad company by a boy about eight and a quarter years old, when injured, for injuries caused by jumping off a car of the defendant when ordered to do so by a person described as a brakeman, it appeared, that the plaintiff and another boy three years older were stealing a ride for amusement, and that the plaintiff was lying on his stomach on the edge of one of three oil tank platform cars, which were in a freight yard, moving very slowly without an engine, when the defendant's servant in charge of the cars, walking toward the plaintiff but not being near him, said "Get off there or I will break your neck", and the plaintiff thereupon put his foot in a step fastened to the car and was going to jump,

Negligence (*continued*).

when he slipped and fell under the wheels, receiving the injuries. *Held*, that there was no evidence to go to the jury of such a wilful and wanton disregard of human life and personal safety on the part of the defendant's servant as would make the defendant liable to the plaintiff, who was a trespasser, and that a verdict for the plaintiff was not justified. *Bjornquist v. Boston & Albany Railroad*, 130.

4. In an action against a street railway company by a newsboy twelve years of age when injured, for personal injuries, it is no evidence of a wanton and reckless act on the part of a conductor of the defendant, that, while standing on the rear platform of an open electric car of which he was in charge, he made a motion and ordered the plaintiff, who in violation of a rule of the company had jumped upon the running board while the car was in motion, "to get out of here" or "get off", whereupon the plaintiff fell off or jumped off and was injured. *Albert v. Boston Elevated Railway*, 210.

*In repairing Roadbed.*

5. A railroad company is not liable to a section hand in its employ for an injury from being struck in the eye by an old spike which flew up when struck with an old hammer by a second foreman of the railroad company, if the company furnished plenty of good spikes and good hammers, especially where it does not appear that either the old spike or the old hammer was defective. *Gauges v. Fückburg Railroad*, 76.

*In Freight Yard.*

6. A flagman in a freight yard, whose duty it is to tend switches, assumes the risk of being run down, while throwing a switch, by a train which is backing slowly in obedience to a signal given by him, where the accident is due to his miscalculating the speed at which the train is moving and his ability to throw the switch in time to get out of the way safely, and where there is nothing to show negligence on the part of the engineer. *Gilgan v. New York, etc. Railroad*, 139.

*On Street Railway.*

Injury to person on track.

7. Although there is no absolute rule of law that a person to exercise due care must look and listen before crossing the track of an electric street railway, yet the circumstances may be such that a failure to look and listen will be conclusive evidence of a want of due care. *Donovan v. Lynn & Boston Railroad*, 533.
8. A woman crossing a city street on her way to purchase meat at eleven o'clock on a misty evening, who without looking or listening steps on the track of an electric street railway in front of an approaching well lighted car ten feet distant, which could have been seen from one hundred and fifty to three hundred feet away, and the motorman of which is making a noise in putting on the brakes sufficient to attract attention, is not in the exercise of due care. *Ibid*.

As to liability of street railway under St. 1886, c. 140, for loss of life of person run over by car while in stupor and incapable of due diligence required by act, see STREET RAILWAY, 4, 5.

## Injury to passenger.

9. In an action against a street railway company by a woman passenger for injuries alleged to have been caused by a collision of another car of the defendant with that in which the plaintiff was a passenger, it appeared, that the plaintiff was sitting on the last seat of an open car of the defendant which had been reversed so that she faced the rear of the car, that the car had stopped, that the tracks had been made somewhat slippery by a shower, and that the motorman of another car of the defendant approaching from the rear, although he applied the brakes and reversed the power in a reasonable and proper manner, was unable wholly to stop his car before the fenders of the two cars came in contact, causing no injury to either car, and causing the other passengers in the car with the plaintiff to feel only the sensation of a jar, that the plaintiff, whose health had been impaired by previous nervous difficulties, seeing the other car approaching and anticipating a collision, took hold of the stanchion at the end of the seat and fainting from nervous fright fell to the floor and sustained superficial bruises, followed afterwards by serious nervous prostration caused by the shock and nervous fright. *Held*, that a finding was warranted that there was no negligence on the part of the defendant. *Whether*, if there had been negligence on the part of the defendant, the plaintiff's injuries could be said to have been due to it, was not considered. *Mullin v. Boston Elevated Railway*, 522.

10. In an action against a street railway company by a woman passenger for injuries sustained in fainting from fright at the anticipated collision of another car of the defendant with the car in which the plaintiff was seated, the defendant may ask the other passengers on the car in which the plaintiff was seated whether any of them received an injury from the collision, to show that none of them received such an injury, the fact that no injury was received by them having an important bearing on the questions of the force with which the cars came together and of the motorman's alleged negligence. *Ibid*.

*In Subway Station.*

11. In an action against a street railway company for personal injuries, it appeared, that the plaintiff had entered an open car of the defendant at a station of the subway in Boston when seeing her daughter, ten years of age, unable to get a seat on the car, the plaintiff got upon the running board for the purpose of alighting, and, when she had one foot upon the station platform, the starter, who could have seen her if he had looked, blew his whistle, and the car started and threw the plaintiff down, causing the injuries. The plaintiff testified that while she was getting out she looked at the starter all the time. *Held*, that there was evidence of the plaintiff's due care and of the defendant's negligence. *Meade v. Boston Elevated Railway*, 327.

*In Factory.*

As to injury from cog wheel gearing, see *post*, 26.

As to injury from gearing of spinning machine, see *post*, 27.

Negligence (*continued*).

As to injury caused by set screw on revolving shaft, see *post*, 22.

In action for injury in factory, question may be excluded as to safeguards used in other factories, see EVIDENCE, 4.

*In Driving.*

Injury to rider of bicycle.

12. In an action for personal injuries alleged to have been caused by the negligence of a driver of a team of the defendant, it appeared, that the defendant's servant was driving two horses in a loaded wagon at a walk, when the plaintiff, a girl of eighteen going in the same direction on a bicycle, attempted to pass on the left between the wagon and the sidewalk, where there was a space of four or five feet, and that when the plaintiff was opposite the middle of the wagon it swerved toward her and knocked her off the bicycle, causing the injuries. She testified that she rang her bell, but it did not appear that the driver heard it, and there was no evidence that the driver knew of the plaintiff's presence until the accident happened or had any reason to suppose that she was trying to pass him. *Held*, that there was no evidence of negligence on the part of the defendant's servant. *Holt v. Cutler*, 24.

Turning upon street railway track to avoid elevated structure.

13. One driving a heavy brewery team along the right side of a street, the centre of which is occupied by the structure supporting an elevated railway with the tracks of a street railway on the surface below, if there is a team ahead of him headed in the same direction drawn up against the curbstone opposite one of the posts of the elevated structure and he has not room to pass between the team and the post without turning upon the track at his left, is bound before driving upon the track to look back to see whether he has an opportunity to do so without being struck by an approaching car; but, if he looks and seeing no car drives upon the track, it is not his duty to turn off the track until he has passed the post and has become aware of the approach of a car from behind. If in such a case the brewery wagon is struck from behind by a car, it is a question of fact whether the driver turned upon the track when the car was so near to him that a collision could not be avoided by due care on the part of the motorman, or whether having an opportunity to turn upon the track he did so and was run down by the negligence of the railway company. *Sullivan v. Boston Elevated Railway*, 602.

Person sitting by and trusting to driver.

14. One sitting on the seat of a brewery wagon beside the driver, not interfering at all with the driving but trusting himself entirely to the driver, if thrown out and injured through the negligence of a street railway company, can recover against the company if the driver was in the exercise of due care. *Ibid*.

*Injury on Pole supporting Wires.*

Liability of town operating electric light plant for injury to lineman from falling of pole on which he was working by order of superintendent who negligently had failed to inspect it, see *post*, 28.

Respective assumption of risk as to soundness of pole by experienced lineman sent to remove wires without superintendent and by inexperienced lineman working under superintendent, see *post*, 24, 28.

As to liability of telephone and telegraph company for injury to lineman caused by pin coming out of pole, see *ante*, 1, *post*, 19-21.

*Injury from Fright.*

15. In an action against a street railway company by a woman passenger for injuries sustained in fainting from fright at the anticipated collision of another car of the defendant with the car in which the plaintiff was seated, evidence in behalf of the defendant, that three years before the accident the plaintiff was subject to fainting spells, is competent to contradict a statement of the plaintiff that she never had been subject to fainting fits before the accident, and also as bearing on the truth of the plaintiff's contention that the fainting fits to which she testified that she was subject were caused by the accident. *Mullin v. Boston Elevated Railway*, 522.

*Employer's Liability.*

Injury from hoisting apparatus.

16. In an action against a transportation company by an employee, for injuries received while at work in the early morning in the hold of a steamer of the defendant, as the head of a gang of three men under one of the hatchways engaged in attaching bales of cargo by means of a rope sling to sister hooks at the end of the fall of a stationary crane by which they were hoisted from the hold, it appeared, that in hoisting the bales the sling was attached by a double back hitch to one of the sister hooks and that both hooks could not be used at once, that about two hours before the accident one of the sister hooks caught in the coaming of the hatchway and was somewhat straightened, and expert witnesses testified that after the hook was straightened it was not safe to make a hitch on it, that one of the employees called out to the defendant's superintendent in charge "Take the hook off or some one will get hurt" and the superintendent replied "Go on with your work and never mind", that it was the duty of the plaintiff while a load was ascending to pick up from under it the sling from the previous load thrown down from the deck, that the plaintiff, as he testified, had been using the hooks continuously all that night whichever came handiest without noticing that there was anything wrong with them, that there was not much light in the hold of the steamer that night, and that at about four A. M. while the plaintiff was leaning over to pick up the sling for the next load, the hitch slipped on the hook and the ascending load fell on the plaintiff, causing the injuries. *Held*, that there was evidence of the plaintiff's due care and of negligence of the defendant's superintendent, and that the risk was not an obvious one assumed by the plaintiff. *Martin v. Merchants & Miners Transportation Co.* 487.

17. In an action for injuries caused by a bale of cargo while being hoisted from the hold of a vessel falling on the plaintiff from the slipping of a

*Negligence (continued).*

good double back hitch of rope on a hook shown to have been somewhat straightened, where an expert has testified that it is not safe to make a hitch on a straightened hook, the fact, that hitches on this hook bound and held forty or fifty times in hoisting bales before the accident, does not preclude a finding that the straightened hook was the sole cause of the injuries. *Martin v. Merchants & Miners Transportation Co.* 487.

18. In an action against a towboat company, by an employee in charge of a wrecking lighter of the defendant having a crew of three men under him, for injuries from the breaking of a pump sling used in moving a wrecking pump from the defendant's wharf to the lighter, causing the pump to fall on the plaintiff who was on deck guiding it with his hands, there was evidence, that the sling had become weakened by rust and was not strong enough for the work, and that this should have been known to the servants of the defendant in charge of the appliances, and it did not appear that there were other slings of sufficient strength within reasonable reach of those servants, that the plaintiff believed that the sling was strong enough to hold the pump and had no reason to believe otherwise, that the plaintiff was reasonably careful in the performance of his duty in trying to turn the pump as it came over toward the lighter, that neither the plaintiff nor any of his crew had anything to do with shackling on the sling, hoisting the pump or lowering it to the deck, their duty being confined to placing it as it was lowered. *Held*, that there was evidence to go to the jury of the plaintiff's due care and of the defendant's negligence. *Carter v. Boston Towboat Co.* 496.

## Use of old instruments.

Railroad company not liable to section hand on account of use by foreman of old spike and old hammer in laying rails, especially where it does not appear that either was defective, see *ante*, 5.

## As to telephone or telegraph pole.

19. In an action against a telephone and telegraph company by a lineman in its employ, for injuries from falling from a pole of the defendant on which the plaintiff was at work, by reason of a pin which the plaintiff was grasping coming out of the pole, there was evidence that the hole into which the pin had been driven was bored so that it slanted downward instead of being on a level or slanting upward, and that the pin was only driven in two and one half inches instead of four inches as there was evidence that it should have been. *Held*, that there was evidence to warrant a finding that there was a defect in the original construction of the pole for which the defendant was liable. *Chisholm v. New England Tel. & Tel. Co.* 82.
20. In an action against a telephone and telegraph company by a lineman in its employ, for injuries from falling from a pole of the defendant on which the plaintiff was at work, by reason of a pin which the plaintiff was grasping coming out of the pole, the fact that linemen were required to drive the pins into the poles after the poles had been set and the holes for the pins bored, does not relieve the defendant from liability, if it does not appear that the plaintiff drove in the pin which came out, the linemen in

driving in the pins acting as agents of the defendant for whose negligence it would be liable. *Chisholm v. New England Tel. & Tel. Co.* 82.

21. A lineman working on a telephone or telegraph pole of his employer does not assume the risk of an accident caused by a pin which he is grasping coming out of the pole, owing to its having been driven in place negligently by another lineman whose duty it was to drive it. *Ibid.*

Duty of town operating electric light plant to inspect its poles, and liability to lineman injured by fall of rotten pole, see *post*, 24, 28.

Injury from set screw on revolving shaft.

22. An experienced machinist cannot recover from his employer for an injury caused by his clothing catching on a set screw of a revolving shaft mounted on a flat car while he was attempting to step over the shaft on his way to carry out an order of a superintendent, especially if there was a safe way by which he could have gone to do work he had been ordered to do. *Kennedy v. Merrimack Paving Co.* 442.

For employing unfit person.

23. In an action against the proprietor of a power plant by a servant in his employ, for personal injuries alleged to have been caused by the negligence of the defendant in employing an unfit and incompetent engineer, it is no evidence of the defendant's negligence that the engineer had been known to drink intoxicating liquor, if there is no evidence that he ever was intoxicated and no evidence that the defendant knew that he drank intoxicating liquor to excess or otherwise. *Delory v. Blodgett*, 126.

Assumption of risk.

24. *Seemle*, that an experienced lineman sent without a superintendent to remove wires from a particular pole has no right to assume that the pole is sound, and as a matter of precaution should inspect the pole for himself. *Lord v. Wakefield*, 214.

Inexperienced lineman climbing electric light pole when working under superintendent does not necessarily assume risk of pole falling from being rotten at the base, see *post*, 28.

Lineman does not assume risk of pin on telephone or telegraph pole coming out on account of negligence of another lineman in driving it in, see *ante*, 21.

Employee working in hold of vessel under defective hoisting apparatus does not assume risk of its fall on account of defect unknown to him, see *ante*, 16. So also of one in charge of wrecking lighter of defendant, see *ante*, 18.

Flagman tending switch in freight yard assumes risk of being run down by train moving under his direction when accident due to his miscalculation and no negligence shown in engineer, see *ante*, 6.

Duty to warn.

25. In an action by a workman against a telephone company, for injuries from the plaintiff's hand being drawn into a snatch block while he was assisting in setting poles of the defendant, it appeared, that the plaintiff was forty years of age but had not handled ropes before, that he was ordered by a foreman to take in the slack of the rope of a derrick used for setting the poles, that he placed his hands on the rope two feet or more



Negligence (*continued*).

from the block, when the foreman said "go ahead" and a pair of horses attached to the rope on the other side of the block started, drawing the plaintiff's hand against the block. *Held*, that the danger was an obvious one, of which it was not the duty of the defendant to give the plaintiff information or warning, *also*, that the plaintiff was negligent in not seeing the block or, if he saw it, in not appreciating the danger, or, if he appreciated the danger in continuing to grasp the rope after the order was given for the horses to go ahead. *Gavin v. Fall River Automatic Tel. Co.* 78.

Duty to instruct.

26. In an action for personal injuries, by an employee of the defendant, it appeared that the plaintiff, a girl fifteen years of age and immature for her years, was set to work in the defendant's factory on a machine used to cut platinum wire, that at the back of the machine a large and a small cog wheel were geared together, and the plaintiff might have seen them as she was walking about the machine, that a workwoman who worked on the machine instructed the plaintiff how to start and stop it. The machine was stopped by pressing a lever which moved back a clutch and disconnected the power. The plaintiff testified that the workwoman who instructed her told her to take hold of the large wheel with her hand after pressing with a file on the lever, and that the workwoman was accustomed to take hold of the wheel to stop it after pressing the lever, as it would not stop at once when the power was disconnected. On the third day of the plaintiff's employment the workwoman went away, and the plaintiff, being alone with the machine, pressed with the file to stop it, and then took hold of the rim of the wheel, but her pressure on the lever did not draw back the clutch far enough to disconnect the power, and her hand was carried over the top of the wheel and drawn into the gearing on the back side, and injured. *Held*, that there was evidence on which a jury might find that the instructions given to the plaintiff were insufficient or misleading to such a degree as to leave the plaintiff unreasonably exposed to danger, and might find that the workwoman representing the defendant in giving the instructions ought to have known that further instructions were needed for so young, unintelligent and inexperienced a person as the plaintiff. *Bowden v. Marlborough Electric, etc. Co.* 549.
27. In an action by a girl fourteen years of age, when injured, who recently had begun to work in the defendant's cotton mill as a bobbin girl, for injuries from having her fingers caught in the gearing of an uncovered spinning machine, it appeared, that the plaintiff never before had worked outside of her home and had no knowledge of machinery, that in the defendant's employ she had worked three weeks upon a machine the gearing of which was covered and it had been a part of her duty to clean the machinery, that she then was put to work under another girl upon a machine like the first except that the gearing was uncovered, that it was not safe to clean the gearing of this machine when it was in motion, and the girl under whom the plaintiff was working had been accustomed to stop the machine and clean the gearing, that after the plaintiff had worked on this machine for three days she was told to clean it without being given

any instructions or warning as to the gearing, and, supposing that it was her duty to clean the gearing as well as the other parts of the machine while it was in motion, she attempted to do so, and received the injuries. *Held*, that there was evidence of the defendant's negligence in failing to give the plaintiff sufficient instructions and in giving her misleading instructions, and that there was evidence to warrant a verdict for the plaintiff. *Dolan v. Boott Cotton Mills*, 576.

Negligence of superintendent.

28. In an action, under St. 1891, c. 370, § 16, against a town operating an electric light plant, for injuries due to the fall of a pole on which the plaintiff was at work under the direction of the defendant's superintendent, it appeared, that the plaintiff, although he had worked for the defendant for several years as a trimmer of arc lights and a general helper about the electrical works, was not an experienced lineman, and was ordered by the defendant's superintendent to go up the pole in question and cut the wires, that the plaintiff after cutting two wires, felt the pole tremble, and said to the superintendent "Don't you think you had better guy this pole?"; that the superintendent replied "The pole is all right; cut them down," and that the plaintiff cut the wires and the pole fell, causing the injuries. The pole had been set eleven years before and was rotten at the base, although the outside was apparently sound. There was nothing to show that the plaintiff knew that the life of a pole was limited or that this pole was an old one. *Held*, that the plaintiff did not necessarily assume the risk of the pole falling, that it was the duty of the superintendent to inspect the pole, and that the jury might find that the plaintiff, although apprehensive of danger if the pole was not guyed, was justified in yielding his judgment to that of his superior and obeying the command, and therefore that it was error to order a verdict for the defendant, and the case should have been submitted to the jury. *Lord v. Wakefield*, 214.

Fellow servant.

Workman furnished by machinery company to repair machinery in power plant under direction of proprietor's superintendent, becomes fellow servant of proprietor's employees, see MASTER AND SERVANT.

## NEW TRIAL.

See PRACTICE, CIVIL, 31-33.

## NUISANCE.

1. An indictment charging the defendant with storing between certain dates large quantities of naphtha on premises kept and maintained by him for the purpose, near private houses and public highways, by reason whereof great quantities of offensive, noxious and unwholesome smells were emitted and impregnated the air, making it unhealthy, is good as an indictment at common law for maintaining a nuisance. *Commonwealth v. Packard*, 64.
2. A license under St. 1894, c. 399, (R. L.-c. 102, §§ 114, 115,) permitting the storage of naphtha in a certain building, is admissible in evidence on

Nuisance (*continued*).

the trial of an indictment at common law for maintaining a nuisance by the storage of naphtha there during the period covered by the license, and proof of compliance with the terms of the license is a defence. *Commonwealth v. Packard*, 64.

Jurisdiction of Supreme Judicial Court to restrain corporation from carrying on without license business established before May 8, 1871, of melting and rendering grease and tallow and making food for fowls from oysters and sea shells, see EQUITY JURISDICTION, 10.

## OPTION.

Lessee having option to purchase leased premises, with agreement that, after election to purchase, rent shall be credited as part of purchase money, held bound to pay rent after notice of intention to purchase, where he has not offered price or demanded deed, see LANDLORD AND TENANT, 5.

## PARTITION.

Under Pub. Sts. c. 178, §§ 14, 15, (R. L. c. 184, §§ 8, 9,) the persons interested in the land of which partition is sought, who have a right to appear in the proceedings, include persons who had been in possession of portions of the land for nearly twenty years when the petition was brought and have been in such possession more than twenty years at the time of the trial and have erected buildings and made other valuable improvements on the land. *Butrick, petitioner*, 107.

In partition proceedings former judgment on writ of entry conclusive only as to parties to it, see JUDGMENT, 2.

## PARTNERSHIP.

*Partnership Debt.*

1. If by the terms of the partnership agreement between two partners it is provided, that each shall take out an insurance policy on his life payable to the other and that these policies shall be kept in force, the premiums on such policies as between the partners are partnership debts. *White v. McPeck*, 451.

*Partnership Note.*

2. A promise by an insurance agent to pay the premiums due from each of two partners on certain insurance policies out of his own funds, the payment of the premiums being required from each partner by the terms of the partnership agreement, is a good consideration for a promissory note of the partnership given to the agent by one of the partners for the amount of the premiums. *White v. McPeck*, 451.
3. In an action on a promissory note signed in the name of a partnership by one of two partners and disputed by the other, it was held that a certain ruling requested by the defendant was refused rightly, in view of the fact that there was evidence of authority to give the note in behalf of the partnership and also of ratification by the other partner after the note was signed. *Ibid*.

*Good Will.*

4. If a partnership has established a business sufficiently permanent in character to include not only the patronage of its customers but the elements of locality and a distinctive name, a good will exists which forms an asset of commercial value in an accounting among partners. *Moore v. Rawson*, 264.
5. If, in a suit by a retiring partner against his co-partners for an accounting, it appears, that on the termination of the partnership the defendants wrongfully appropriated to their own use the property of the partnership including the good will, they will be held to account to the plaintiff for the good will in the same way as if they had purchased it or had sold it to a stranger, regardless of the question whether the firm name could have been used without the consent in writing of one of the defendants. *Ibid.*

*Dissolution.*

6. On the dissolution of a partnership the beneficial interests of the partners in the assets of the firm become several, subject only to the payment of the debts of the firm and the settlement of accounts between the partners. *Moore v. Rawson*, 264.

*Accounting on Dissolution.*

7. Where by a dissolution under the terms of a partnership agreement, which contained no provision as to winding up the business, one of the partners is forced by the other partners to retire, and the remaining partners refuse the retired partner an accounting, and, forming a new partnership, continue the business using the retired partner's share in the property and good will of the old firm as part of their working capital, the remaining partners must account to the retired partner, not only for his share of the partnership property including the good will, but also for his share in all actual profits derived from the property, or must pay him interest on his share of the capital if he so elects. The court in its discretion may allow the remaining partners in accounting for the actual profits to deduct from the net profits such a sum as is found to be attributable solely to their skill and services in conducting the business. *Moore v. Rawson*, 264.
8. If a partnership agreement provides that interest at a certain rate shall be allowed on all capital furnished by the respective partners, this does not entitle the partners to interest on such capital after dissolution before a balance has been found due and before a reasonable time for winding up the affairs of the firm has elapsed. *Ibid.*

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On issue of value of partnership business, sums allowed to partners as compensation for services rendered should be deducted in reckoning income produced. Net profits before and after act for which damages are claimed are admissible to show value of business and damages to it. Evidence of actuary as to expectation of life of partners inadmissible, see DAMAGES, 4-7.

## PLEADING, CIVIL.

*Declaration.*

1. A count for money paid, bad for want of an averment that the money was paid at the defendant's request, is not cured by an allegation of a subsequent promise of the defendant to pay the money to the plaintiff. *Massachusetts Mut. Life Ins. Co. v. Green*, 306.
2. Under a count upon an account annexed, a plaintiff can recover for money paid without an express averment that the money was paid at the defendant's request, such an averment being implied by force of R. L. c. 173, § 6, cl. 8. *Ibid.*
3. In an action against a city for personal injuries, a declaration, setting forth in substance a defect in a highway of the defendant, alleged that the plaintiff owing to the negligence of the defendant "or its employees" fell into an unlighted and unguarded excavation which "the defendant or its employees" had made at a certain point in the highway. *Held*, that if the phrase the "defendant or its employees" was ambiguous, as covering employees of a department for whose negligence the city would be liable at common law, such a defect in the declaration, if it existed, could be taken advantage of only by demurrer and not under an answer of general denial. *Cronan v. Woburn*, 91.

Declaration in action for defect in highway good without averment that it was defendant's duty to keep street in repair, as court takes judicial notice of such statutory duty, see *WAY*, 4.

Declaration joining cause of action against corporation, for negligently charging highway with electricity, with cause of action against city for allowing highway to remain thus charged, bad on demurrer, see *WAY*, 8.

## PLEADING, CRIMINAL.

*Indictment.*

Indictment for storage of naphtha held good as indictment at common law for maintaining nuisance, see *NUISANCE*, 1.

## POND.

Correlative rights of manufacturing company holding lease of artificial pond and of ice company having exclusive right to take ice from same pond, see *LANDLORD AND TENANT*, 2, 3.

For great pond, see that title.

## POWER.

If a married woman makes a present conveyance of personal property to a trustee, retaining a beneficial interest during her life, with a gift over upon her death, subject to be varied by appointment upon giving notice in writing to the trustee, and no mention is made of a power of appointment by will, the power can be exercised only during the lifetime of the donor, and an attempted revocation of the trust by will is void. *Kelley v. Snow*, 288.

## PRACTICE, CIVIL.

*Amendment.*

1. It is within the discretion of a presiding judge to determine the stage of the trial at which an amendment shall be allowed. *Cogswell v. Hall*, 455.
  2. On a motion to amend a declaration the decision of the presiding judge is final upon the question of fact whether the plaintiff intended to include the substance of the amendment in his demand. *Ibid.*
  3. On a motion to amend the declaration in an action against an executor, the fact that a new action for the cause stated in the amendment would be barred by the special statute of limitations, so far from being a ground for denying the motion, is a reason for allowing the amendment. *Ibid.*
  4. In an action against a city for personal injuries, in which the declaration did not allege formally a defect in a highway, it appeared, that a notice in writing given to the defendant within the time required by the highway act, alleged in substance that the plaintiff was injured by reason of a defect in a highway of the defendant caused by negligence of the defendant and its employees in making an excavation at the corner of certain streets. The defendant was not misled by the notice, and the case was tried solely on the issue of such a defect. At the close of the evidence the plaintiff was given leave to amend his declaration before final judgment by alleging expressly a defect in the highway. The jury returned a verdict for the plaintiff, and thereafter the plaintiff was allowed to make this amendment before judgment. *Held*, that for the purposes of the trial the amendment might be treated as made before verdict when the motion to amend was allowed, and that if there had been a variance it was cured by the amendment. *Cronan v. Woburn*, 91.
  5. Under the employers' liability act, R. L. c. 106, §§ 72, 73, an action for causing the death of an employee after conscious suffering must be brought by his legal representatives, while for causing his instant death an action can be brought only by his widow, or if he leaves no widow, his next of kin, who were dependent upon his wages for support. A declaration by an administrator under that act alleged that the plaintiff's intestate was killed instantly and that he "left no widow but three children for whose use and benefit this action is brought." The plaintiff asked to amend by substituting as plaintiffs the widow and children of the deceased and alleging that they were dependent upon his wages for support. The trial judge ruled that the amendment introduced a new cause of action and the court had no power to allow it. *Held*, that the ruling was wrong, and that the court had power to allow the amendment. The mistake of the plaintiff was not in regard to the cause of action but in regard to the party in whose name the action should be brought. *Silva v. New England Brick Co.* 151.
- One entitled to equitable relief for assessment of damages under grade crossing act, has no right to have original petition for abolition of grade crossing amended by inserting his petition in it, see *GRADE CROSSING ACTS*, 1.

*Agreed Statement of Facts.*

6. From a statement in an agreed statement of facts, that a certain court of general jurisdiction in another State made a decree purporting to dissolve a certain corporation organized in that State, it is not a necessary inference that the corporation was dissolved. *Olds v. City Trust, etc. Co. of Philadelphia*, 500.
7. Because an agreed statement of facts states that a certain witness testified that when certain notes matured he was solvent and able to pay them and that he thereafter became insolvent and unable to pay them, it is not a conclusion of law that the witness ever was solvent or that anything could have been recovered on the notes at maturity. *Ibid*.

• *Auditor's Report.*

8. Where the parties to an action agree that an auditor's report therein shall be taken as an agreed statement of facts, and that, if the agreed facts warrant the conclusion reached by the auditor, the judgment shall follow the auditor's finding, the only question open in this court, on an appeal from a judgment following the auditor's finding, is whether the auditor was bound as matter of law to come to a different conclusion on the facts reported. In this case the facts warranted the finding of the auditor. *Harvard Brewing Co. v. Pratt*, 406.
9. An auditor, who was not directed to report the evidence taken before him, concluded his report as follows: "The testimony is in four volumes marked. . . . All said exhibits and testimony are hereby referred to for full particulars as to all matters therein contained and shown." *Held*, that the reference in the sentence last quoted did not make the evidence a part of the auditor's report. *Butrick, petitioner*, 107.

## Report of.

*Commissioners.*

10. A report of commissioners appointed under St. 1895, c. 488, § 14, to determine the damages suffered by the owner of an established business on land in the town of West Boylston decreased in value by the carrying out of that act, is not expected to set forth the evidence with more fulness than is reasonably necessary properly to present such questions of law as are raised before the commissioners. In the present case the report presented everything necessary to an understanding of the questions involved. *Sawyer v. Commonwealth*, 358.

## Compensation of.

- Compensation of commissioners appointed under St. 1901, c. 366, cannot be taxed as costs in absence of agreement between parties. St. 1901, c. 366, applies to case pending before full court on award of commissioners, see COMMISSIONERS, 1, 2.

*Claim for Jury.*

11. Under Rule 18 of the Superior Court, providing that the court by special order may "extend the time" for claiming a trial by jury, it is within the discretion of the court to make an order permitting a trial by jury, although the motion to put the case on the jury list is made after the expi-

ration of the time fixed by the rule for filing the notice of a claim for a jury. *Dolan v. Boott Cotton Mills*, 576.

*Conduct of Trial.*

Judge may require party offering instrument showing alteration on its face, to explain alteration before reading instrument, see ALTERATION OF INSTRUMENTS, 2.

*Costs.*

12. Payment of costs provisionally by one of the parties to an award of commissioners, while it is before this court does not change the legal status of the award on the subject of costs, the payment being presumed to have been made subject to the action of the court upon the validity and legal effect of this part of the award. *Gloucester Water Supply Co. v. Gloucester*, 535.

Under St. 1901, c. 366, compensation of commissioners cannot be taxed as part of costs to one or both parties, see COMMISSIONERS, 1.

Under R. L. c. 170, § 2, concerning cross action against non-resident plaintiff, costs in foreign judgment are part of that judgment and subject to set-off, see *post*, 14.

Double costs allowed in *Gerrish v. Hayes*, 222.

*Cross Action against Non-resident Plaintiff.*

13. Under R. L. c. 170, § 2, the right to set off a judgment, of the nature described in the statute, by a cross action against a non-resident plaintiff, is absolute where there is only one defendant in the original action, and where there are several defendants may be permitted at the discretion of the court. *Franks v. Edinberg*, 49.

14. In an action by a non-resident plaintiff on a New York judgment, the defendant was allowed under R. L. c. 170, § 2, to set off a judgment against the plaintiff in a cross action brought here, but the Superior Court excluded from the set-off the costs recovered by the plaintiff in the New York court. The defendant appealed from the order excluding the New York costs. The plaintiff did not appeal. It appeared that the plaintiff after bringing his action here had assigned his New York judgment. The plaintiff contended that the assignment was a bar to the set-off. *Held*, that the costs in the New York judgment were part of that judgment, and not being costs in the action brought here on that judgment should have been included in the set-off. *Held, also*, that the assignment by the plaintiff was no bar to the set-off, as nothing further appearing, it was assumed that the assignee took subject to the defendant's right to bring his cross action under the statute and have the judgment set off, and therefore the court found it unnecessary to decide whether this point was open to the plaintiff on the defendant's appeal. *Ibid*.

*Motion to Dismiss.*

15. A motion to dismiss a petition for nullity of marriage, on the ground that the petitioner is in contempt for not complying with an order of court to pay a certain sum of money into court, is a proper way of bringing the



Practice, Civil (*continued*).

fact of the contempt to the attention of the court, and need not be filed within the time limited for pleas in abatement. *Lind v. Lind*, 361.

*Exceptions.*

16. No exception lies to the exclusion by a presiding judge of a non-responsive answer of a witness to an interrogatory in a deposition, although the deposition was taken in behalf of the party objecting to the answer. *Chicago Title & Trust Co. v. Smith*, 363.
17. On the argument of exceptions, the answer of a witness cannot be objected to as non-responsive, if at the trial the only objection to the testimony was on the ground that it was not admissible. *Keefe v. Norfolk Suburban Street Railway*, 247.
18. Where a question to a witness is excepted to, and the question is allowed and answered, and the excepting party does not further except to the answer or ask the judge to strike out any part of it as non-responsive, he cannot afterwards contend in this court that a non-responsive portion of the answer is inadmissible, if the question itself and the responsive portion of the answer are admissible. *Cashin v. New York, etc. Railroad*, 543.
19. A defendant excepted to a refusal of the presiding judge to rule that the declaration set forth no cause of action. Thereafter the plaintiff was allowed to amend his declaration, and did so. The defendant asked for no ruling on the amended declaration and stated in his opening to the jury that his only defence was on a question of fact. On this question the jury found for the plaintiff, and the defendant alleged exceptions. *Held*, that the defence that the declaration as amended set forth no cause of action was not open to the defendant, and that his exceptions based on this ground were frivolous. *Gerrish v. Hayes*, 222.
20. Rule 48 of the Superior Court, providing that, when further instructions are given in the absence of counsel after the jury have retired, the presiding judge may permit exceptions thereto at any time within twenty-four hours next following, is to enable counsel to ascertain what has passed in their absence and to give them an opportunity to except, and the time for taking an exception is not enlarged by the failure of counsel to ascertain what happened in their absence. *Goodrum v. Grimes*, 80.
21. No exception lies to the exclusion of evidence of a fact afterwards found in favor of the party offering the evidence. *Brigham v. Morgan*, 27.
22. A condition in a life insurance policy required the insured to have been in sound health at the time the policy was issued. There was evidence that at the time the policy was issued the insured was subject to epileptic fits and that he died of epilepsy. There also was evidence in contradiction of this. In an action on the policy, the jury found that the insured was in sound health when the policy was issued, and that he did not have epileptic fits before that time. The defendant excepted to a refusal of the presiding judge to rule that, if at the date of the policy the insured was subject to fits or bad spells or loss of consciousness, he was not in sound health at that time. *Held*, that the finding of the jury made this request immaterial and the defendant was not harmed by the refusal. *Whether* it could have been ruled as matter of law, that the

insured was not in sound health if subject to fits or bad spells or loss of consciousness, *quare*. *Emerson v. Metropolitan Life Ins. Co.* 318.

23. No exception lies to the exclusion of evidence if the same evidence in substance already has been admitted without objection and it does not appear that the party offering the evidence has been harmed by the exclusion. *Walker Ice Co. v. American Steel & Wire Co.* 463.
  24. In an action against a street railway company by a woman passenger for injuries alleged to have resulted in sufferings from nervous shock, the defendant, against the plaintiff's objection, was allowed to ask the attending physician of the plaintiff, whether he got from the plaintiff or from any one else in her presence any of her family history concerning her mother's physical condition or the mental or nervous condition of her sisters. The witness answered that he never did. *Held*, that the admission of the questions on this subject gave the plaintiff no ground of exception, as owing to the answer of the witness they could do the plaintiff no harm. *Whether* the questions were admitted properly was not considered. *Mullin v. Boston Elevated Railway*, 522.
  25. Where other evidence besides an auditor's report has been introduced at a trial, no exception lies to a refusal to rule that on the facts and findings in the auditor's report the auditor's general finding was not warranted, and that on the facts as stated by the auditor in his report the jury must find the other way, it being within the discretion of a trial judge to refuse a request for a ruling upon the effect of only a part of the evidence considered separately from the rest. *American Tube Works v. Tucker*, 236.
  26. The language of a request for an instruction, although correct, need not be followed by the presiding judge in giving the instruction in substance. *Graham v. Middleby*, 349.
  27. It is proper to refuse a request for an instruction which assumes as a fact one of the matters in controversy. *Walker Ice Co. v. American Steel & Wire Co.* 463.
  28. The rule, that an exception will not be sustained to the exclusion of testimony unless it appears what the testimony would have been, does not apply to the exclusion of the testimony of a witness, offered as an expert as to the value of land, solely on the ground that he was not qualified as an expert. *Muskeget Island Club v. Nantucket*, 303.
- On issue of speed of team at time of accident caused by defect in way, admission of evidence that some time before accident team went by witness rapidly is within discretion of judge, see *WAT*, 6.

#### *Charge to Jury.*

29. An illustration in the charge of a presiding judge in a bastardy case, to show that a complainant might be believed as to the material facts in such a case without the jury accepting her whole story, was held to give no ground for exception, where there was nothing which fairly could be construed as manifesting an intention on the part of the judge to give his own opinion as to the credibility of the witness. *Burns v. Donoghue*, 71.

*Report.*

30. A petition under R. L. c. 182, §§ 11-14, to determine the validity, nature and extent of alleged restrictions on land is a proceeding at law, and a decree therein must be ordered by a judge of the Superior Court before he can report the case for determination by this court. *American Unitarian Association v. Minot*, 589.

*New Trial.*

31. Rule 44 of the Superior Court requiring a motion for a new trial on account of any opinions or decisions of the judge, given in the course of the trial, to be filed within three days after verdict is returned, unless the time for filing such motion is extended by the judge, does not permit an exception to the denial of such a motion for a new trial filed after the three days. *Goodrum v. Grimes*, 80.
32. Further instructions, in the absence of counsel, to a jury after they have returned a verdict which the judge considers imperfect in form, and still further instructions after the jury have been sent out for a second time and again have come into court, are "opinions or decisions of the judge, given in the course of the trial," within the meaning of Rule 44 of the Superior Court requiring a motion for a new trial to be filed within three days after the verdict is returned. *Ibid.*
33. Where, in two cases tried together involving various issues, exceptions were sustained upon one issue only, it was ordered that the new trial should be confined to that issue. *Graves v. Broughton*, 174.

*Order denying Petition.*

34. On a petition of a former attorney at law, for reinstatement as an attorney after disbarment, the Superior Court made the order "Petition of S. for reinstatement as attorney at law denied without prejudice to his filing another petition of like tenor after July 1, 1906." *Held*, that the last part of the order relating to the filing of another petition was for the benefit of the petitioner, and was not intended to preclude the petitioner from a hearing on the merits of another petition filed before July 1, 1906, founded on facts not included in the petition denied, and therefore that the order was valid. *Sullivan, petitioner*, 426.

## PRESCRIPTION.

Owner of prescriptive right to pollute stream entitled to compensation for its taking under St. 1895, c. 488. *Quære*, whether Legislature can forbid pollution of watercourse by one having prescriptive right to pollute without providing compensation, see CONSTITUTIONAL LAW, 1, 5.

## PROBATE COURT.

Judge of probate under St. 1889, c. 311, can appoint auditor to report upon executor's accounts previously approved by judge, before final account allowed, see EXECUTOR AND ADMINISTRATOR, 2.

## PROHIBITION.

Justice of the peace prohibited from committing to jail for contempt deponent who refused to answer proper question during taking of deposition, see *Lawson v. Rowley*, 171. —

## PROXIMATE CAUSE.

One by fraudulent representation inducing another not to sell stock is liable for loss to owner from fall in stock caused by discovery of embezzlement of funds of corporation, see *DECEIT*.

Railroad accident rendering plaintiff subject to attacks of dizziness not proximate cause of her injuries by fall from dizziness when she had climbed into sink to look at leak in water pipe, see *DAMAGES*, 12.

Negligence of street railway company in leaving large reel on grass within limits of highway not proximate cause of accident from children taking reel and rolling it down street, see *NEGLIGENCE*, 2.

## RAILROAD.

Liability of, for act of brakeman in ordering child trespasser to leave moving car, see *NEGLIGENCE*, 3.

Power of county commissioners to lay out private way over land of railroad company outside its route, see *WAY*, 2.

Rights of one injured by locomotive operated by receivers of railroad corporation who afterwards sell all its assets, see *EQUITY JURISDICTION*, 3.

Not liable for injury to flagman tending switch caused by his miscalculation of speed of train moving under his direction where no negligence shown in engineer, see *NEGLIGENCE*, 6.

## REAL ACTION.

1. Where a will contained a devise of land to one of several heirs at law of the testator upon a condition precedent which had not been performed by the devisee, and the other heirs at law brought a writ of entry against the devisee, who had taken possession of the land, and prevailed on this ground, judgment was entered only for the proportional undivided portions of the land belonging to the demandants, the tenant being entitled to retain his undivided share in the land as one of the heirs at law. *Brennan v. Brennan*, 560.
2. Where on the trial of a writ of entry, it appears, that the demandant claims under an attachment and a subsequent sale on execution, and the tenant establishes his title through a foreclosure sale under a mortgage made before the bringing of the action in which the demandant's attachment was made, it is immaterial that the tenant also holds a deed from one whose title was acquired after the attachment, and evidence of an oral agreement alleged to affect the last named deed is not admissible in behalf of the demandant. Even if the tenant held under a deed subject to an oral agreement, this could not be proved in the real action, and the

agreement would be enforceable in equity only on showing that the defendant in equity had knowledge of it. *Carlisle v. Libby*, 445.

#### RECEIVER.

One who is party to general creditor's suit in another State, in which receiver has been appointed, cannot maintain suit of equitable attachment here to reach funds held to be due to corporation, see EQUITY JURISDICTION, 2.

Court will not take jurisdiction in equity of suit to reach and apply property sold to defendant by receiver appointed by foreign court on claim arising during receivership, see EQUITY JURISDICTION, 3.

Equities in fund held by receiver may be adjusted by petition filed in suit in which receiver was appointed, see JOINT TORTFEASORS.

#### RELEASE.

The widow and children of one deceased, in settling a claim of his mother upon his estate, which his estate was insufficient to pay in full, executed a release under seal of all their claim upon the estate of the mother if she died intestate. The mother so died, and, four years after her estate had been settled, new assets were discovered consisting of a savings bank deposit in the mother's name. The widow and children of the deceased son claimed their distributive share in this deposit, on the ground that its existence was not known when they executed the release. *Held*, that, to establish such a claim, they must show that, if the deposit had been known when the settlement with the mother was made, it would have been included in the settlement as a part of the mother's estate, and, as this did not appear, the release must be held to be a bar to their claim, and, in a suit in equity brought by the other children of the mother, the widow and children of the deceased son were enjoined from asserting a claim to their distributive share of the deposit. *Dorman v. Dorman*, 153.

#### RULES OF COURT.

Under Rule 18 of Superior Court, judge may grant jury trial although motion to put case on jury list is made after expiration of time for filing notice of claim for jury, see PRACTICE, CIVIL, 11.

Chancery Rules 31 and 32 of Supreme Judicial Court as to exceptions to master's report are in force in equity causes in Superior Court, see EQUITY PLEADING AND PRACTICE, 10.

Rule 44 of Superior Court does not permit exception to denial of motion for new trial filed after three day period fixed by rule. Further instructions given after bringing in of imperfect verdict are "opinions or decisions of the judge, given in the course of the trial," within meaning of rule, see PRACTICE, CIVIL, 31, 32.

Under Rule 48 of Superior Court time for allowance of exceptions to instructions, given in absence of counsel after jury have retired, not enlarged by failure of counsel to ascertain within that period what happened in their absence, see PRACTICE, CIVIL, 20.

## SALE.

Acceptance of apparatus for making ice by failing to notify seller that apparatus did not accomplish results guaranteed and requesting its removal, as required by contract in order to reject apparatus, see **CONTRACT**, 15.

One holding chattel under contract of conditional sale who has paid certain instalments, title remaining in seller until full payment, has insurable interest only to extent of payments made, see **INSURANCE**, 2.

## SALES OF MERCHANDISE IN BULK.

St. 1903, c. 415, regulating sales of merchandise in bulk not made in regular course of business, constitutional, see **CONSTITUTIONAL LAW**, 2.

## SAVINGS BANK.

Whether deposit in savings bank stated to be in trust for another person creates trust, depends on intent of depositor and is question of fact, see **TRUST**, 1.

## SCHOOL.

A contract, made while St. 1894, c. 498, § 8, was in force, by a resident of a town in this Commonwealth with another town therein to pay for the tuition of his children attending school in the latter town with the consent of the school committee of that town is valid. *Wrentham v. Fales*, 539.

## SLANDER.

For words absolutely privileged as spoken in course of judicial proceedings, see **LIBEL AND SLANDER**.

## STATUTE.

*Construction.*

1. Criminal statutes are to be construed strictly and cannot be enlarged by implication. *Commonwealth v. Alexander*, 551.
2. Where there is a substantial doubt as to the meaning of the language used in a compilation of statutes, the statute in question as it previously existed, especially when taken with a note of the commissioners indicating an intention to make no change, furnishes a valuable guide to the construction of the statute in its new form. *Franks v. Edinberg*, 49.

*Repeal.*

3. The rule, that a statutory right of action is taken away by a repeal of the statute without a saving clause, does not apply to a right of action on an express contract valid by reason of the first statute and made while that statute was in force. *Wrentham v. Fales*, 539.

# STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

# STATUTES CITED AND EXPOUNDED.

See page 701.

# STOUGHTON.

Contract for construction of waterworks taking water from unauthorized source not binding on town, see MUNICIPAL CORPORATIONS, 3.

# STREET RAILWAY.

## *Authority of Conductor.*

1. *Semble*, that it is not within the scope of the employment of the conductor of a street railway car, without express authority, to procure the arrest of a passenger on his car, for alleged violation of Pub. Sts. c. 112, § 197, (R. L. c. 111, § 251,) in fraudulently evading the payment of a fare, or to make a complaint against him before a magistrate for this offence. *Crowley v. Fitchburg & Leominster Street Railway*, 279.

## *Condition imposed by Grant of Location.*

2. Under St. 1898, c. 578, § 13, the board of aldermen of a city or the selectmen of a town, in granting a location to a street railway company, cannot impose a condition regulating and restricting the fares to be charged. *Keefe v. Lexington & Boston Street Railway*, 183.
3. A street railway company by accepting a location granted by the board of aldermen of a city or the selectmen of a town, does not make a contract with the granting board or the municipality to fulfil a condition of location illegally imposed. *Ibid.*

## *Liability for Loss of Life.*

4. To recover from a street railway company, under St. 1886, c. 140, for the loss of life of a person not a passenger or an employee of the company, the plaintiff must show that his testator or intestate was actively and actually in the exercise of due diligence at the time of the injury which caused his death. *Hudson v. Lynn & Boston Railroad*, 510.
5. A person in such a stupor, from intoxication or otherwise, that shaking and kicking him does not wake him, cannot be found to have been in the exercise of the due diligence required by St. 1886, c. 140, to enable his administrator to recover from a street railway company for causing his death by an injury suffered while in this condition. *Ibid.*

## *Rule as to Transfers.*

6. A rule of a street railway company, operating two connecting lines of railway, requiring a passenger changing from one line to the other to produce

a transfer or pay his fare on the line to which he has changed, is a reasonable rule, which is binding on a passenger to whom it is known. *Crowley v. Fitchburg & Leominster Street Railway*, 279.

7. A rule of a street railway company, requiring a passenger changing from one of its lines to another to produce a transfer or to pay his fare on the line to which he has changed, cannot be waived by the conductor of the car from which the passenger has come or by the conductor of the car to which he has changed. *Ibid.*

#### *Negligence.*

As to negligence in starting car in subway station while plaintiff was endeavoring to alight, see NEGLIGENCE, 11.

Liability for injury to driver of team turning on track to avoid post of elevated structure, see NEGLIGENCE, 13.

As to evidence of wanton and reckless act of conductor in ordering trespasser to leave moving car, see NEGLIGENCE, 4.

Street railway company leaving large reel in secure position on grass within limits of highway not liable for injury caused by school children taking reel and rolling it down street, see NEGLIGENCE, 2.

### SUPREME JUDICIAL COURT.

Jurisdiction of, to enjoin business alleged to be nuisance, see EQUITY JURISDICTION, 10.

### SURETY.

#### *On Bond of Municipal Officer.*

1. The sureties on the bond of a collector of taxes given for the faithful discharge of his duties during his whole term are liable for sums received during the portion of his term before the bond was given. *Hudson v. Miles*, 582.
2. In an action by a town against the sureties on the bond of a defaulting collector of taxes, the defendants are liable for any deficiency in the funds to be accounted for by the collector during the term covered by the bond arising from his application of the funds in payment of previous deficiencies, if the payments were received by the town in good faith. *Ibid.*
3. If the bond of a collector of taxes of a town with two sureties has been approved by the selectmen of the town under the requirements of R. L. c. 25, § 77, c. 12, § 87, another bond with twenty sureties given later by the same collector for the same period and accepted by the town is good at common law even if the selectmen have exhausted their statutory power of approval. *Ibid.*
4. Cases cited, deciding that an instrument under seal needs no consideration, although the point that the bond in this case was without consideration as to the sureties was not open, not having been taken at the trial. *Ibid.*
5. It is no defence to an action by a town against individual sureties on the bond of a defaulting collector of taxes, that before the defendants signed the bond as sureties officers of surety companies had stated to the chair-



*Surety (continued).*

man of the selectmen of the plaintiff that they had investigated the collector's character and habits, that there was a woman mixed up in the case, and that on account of his bad reputation they had refused to go on his bond giving as their ostensible reason that they did not wish to go on collectors' bonds, and that the chairman "informally reported" to the other selectmen and to one of the defendants what he was told, no disclosure being made to the other defendants. *Hudson v. Miles*, 582.

6. In an action by a town against twenty sureties on the bond of a defaulting collector of taxes, who previously had filed a bond with two sureties for the same period, it is immaterial whether the new bond was intended by the principal and the sureties as an additional bond or as a substitute for the former bond, or whether the sureties were ignorant of the existence of the former bond, if the delivery of the new bond was absolute and was not made conditional on any of these things. *Ibid.*
7. Negligence on the part of the auditors, selectmen and treasurer of a town in failing to discover the misconduct of a defaulting collector of taxes is no defence to an action by the town against the sureties on the collector's bond. *Ibid.*
8. In an action by a town against the sureties on the bond of a defaulting collector of taxes, the defendants cannot introduce evidence of statements made to them by the principal to induce them to sign as sureties which never were brought to the knowledge of the plaintiff or its selectmen. *Ibid.*

*On Bond to dissolve Attachment.*

9. A surety on a bond to dissolve an attachment by trustee process, on the giving of which the plaintiff released the alleged trustee who thereupon paid to the defendant a debt in excess of the plaintiff's claim, is estopped when sued on the bond from setting up that the trustee could not have been held on his answer and that therefore there was no valid attachment. *Olds v. City Trust, etc. Co. of Philadelphia*, 500.
10. It is no defence at law to an action against a surety on a bond to dissolve an attachment, that the plaintiff has not exhausted other remedies before suing the defendant or has failed to realize on collateral security. *Ibid.*

*On Bond of Administrator.*

Liability of surety on administrator's bond not fixed until judgment obtained against estate and administrator fails to pay it on demand, see **INSOLVENCY**.

*Guaranty of Lease.*

As to guaranty of performance of covenants of lease, see **GUARANTY**, 1-3 ; **LANDLORD AND TENANT**, 8.

**TAUNTON.**

As to proportion of total cost of abolition of certain grade crossing in Taunton properly chargeable to street railway company, see **GRADE CROSSING ACTS**, 4.

## TAX.

*Arrest for Non-payment.*

1. A person arrested for non-payment of taxes has a right to require that the provisions of the statute shall have been followed strictly. *Hunt v. Holston*, 137.
2. Under St. 1889, c. 334, §§ 1, 4, requiring that before a person could be arrested for non-payment of a tax a demand should be made upon him "by causing to be given", or sent postpaid through the mail, as provided by the act, a notice of the tax to the person assessed, the words "causing to be given" refer to a notice delivered to the taxpayer in person, and are not complied with by an actual notice received by mail but not addressed as required by the act in case of a notice by mail. Otherwise under the present statutes. R. L. c. 13, §§ 1, 3. *Ibid.*

*Assessment.*

## Of property of corporation.

3. Under Pub. Sts. c. 11, § 53, (R. L. c. 12, §§ 58, 59,) the machinery of a manufacturing corporation is to be taxed as personal property, and must be valued separately from the land and buildings of the corporation. If the land and buildings are overvalued, the corporation is entitled to an abatement, whether the land, buildings and machinery taken together are overvalued or not. *Hamilton Manuf. Co. v. Lowell*, 114.

## Of real estate used by permission.

4. A manufacturing corporation maintaining a wall of one of its mill buildings on land within the location of a railroad company outside the limits of the route of the railroad, by permission of the railroad company and of the owner of the fee of the land, is not taxable for the land so used by it. *Ibid.*

## Of mortgaged real estate.

5. Under our statutes taxes on mortgaged real estate, where neither the mortgagor nor the mortgagee has required a separate assessment, are assessable wholly to the mortgagor in possession. *Abbott v. Frost*, 398.

*Exemption.*

6. Under R. L. c. 12, § 5, cl. 2, land of the Commonwealth, for which the Commonwealth has given a bond for a deed, in possession of the obligee who will become entitled to a deed on payment of the purchase money and who has erected buildings upon the land and is carrying on business there, is exempt from taxation. *Corcoran v. Boston*, 325.
7. Under R. L. c. 12, § 5, cl. 3, the exemption of the real estate of a literary institution from taxation does not exempt real estate used to produce income to be expended for the purposes of the institution, but does exempt real estate used for one of the purposes for which the corporation was established, and if this is the dominant purpose it is immaterial that there may be incidental results of the use which would not entitle the property to exemption. The dominant purpose of the managing officers of the

Tax (*continued*).

corporation, so long as they act in good faith and not unreasonably in determining how to use its real estate, will be given effect by the courts. *Emerson v. Milton Academy*, 414.

8. Under R. L. c. 12, § 5, cl. 3, real estate of the trustees of Milton Academy used for dwelling houses of teachers of the academy with their families as an aid in preserving discipline and in bringing about closer relations with the pupils, the use being allowed as part of the compensation of the teachers, properly can be found to be occupied for the purposes for which the institution was incorporated, and therefore to be exempt from taxation; so can land used for a baseball field and a football field with spaces for spectators, and so can unimproved swampy and thinly wooded land used for recreation by the pupils of the academy. *Ibid.*

*On Collateral Inheritances.*

## Exemption from.

9. The exemption from the succession tax imposed by St. 1891, c. 425, § 1, (R. L. c. 15, § 1,) of gifts "to or for the use of charitable, educational or religious societies or institutions, the property of which is by law exempt from taxation," exempts bequests and devises to a society or institution whose property is generally exempt from taxation, whether the particular gift when in the hands of the society or institution will be exempt from taxation or not. *First Univ. Soc. in Salem v. Bradford*, 310.
10. A bequest or devise to a religious society is not subject to a succession tax under St. 1891, c. 425, § 1, (R. L. c. 15, § 1,) and this rule applies to a devise to a religious society of land and a dwelling house "to be used and occupied only as a parsonage", which will be taxable to the religious society when thus used and occupied. *Ibid.*

## Future estates.

11. St. 1902, c. 473, postponing the payment of the collateral inheritance tax on future estates until the persons entitled come into possession of them, is retrospective as well as prospective, and applies to all cases where there has been before its passage, as well as where there shall be thereafter, a devise, descent or bequest liable to the collateral inheritance tax. *Stevens v. Bradford*, 439.

*Sale.*

## Of mortgaged real estate.

12. A sale of mortgaged real estate for non-payment of taxes on the whole property, legally assessed to the mortgagor alone, if the statutory requirements have been complied with, passes to the grantee of the collector an absolute title to the whole estate freed from the mortgage and all other incumbrances, subject only to the right of redemption given by R. L. c. 13, § 58. *Abbott v. Frost*, 398.

## Made after expiration of two years.

13. Under R. L. c. 13, § 35, the lien for taxes assessed on real estate, where there has been no alienation of the property, continues after the expiration of two years until the tax is paid or the property is sold, and in such a case a purchaser at a tax sale made after the two years gets as good a title as if the sale had taken place within that period. *Ibid.*

**Attempted alienation after notice.**

14. After notice of a tax sale of mortgaged real estate to take place on a certain day has been given, an entry of the mortgagee for the purpose of foreclosure under R. L. c. 187, § 1, and a subsequent sale under a power of sale in the mortgage, do not operate as an alienation of the property or in any way affect the rights of the purchaser at the tax sale. *Abbott v. Frost*, 398.

**Redemption.**

15. Under St. 1888, c. 390, § 57, (R. L. c. 13, § 58,) an assignee of a mortgage, under an assignment made before a tax sale and unrecorded at the time of the sale, upon recording his assignment, becomes the mortgagee of record entitled to redeem. *Hawks v. Davis*, 119.
16. Under St. 1888, c. 390, § 57, (R. L. c. 13, § 58,) which gives a mortgagee of record the right to redeem from a tax sale within two years after he has actual notice of the sale, it is a question of fact for the jury whether a person, who acted as the mortgagee's agent in holding the notes and mortgage for the purpose of collecting interest, had authority to receive such a notice so that actual notice to him would be actual notice to the mortgagee. *Ibid.*
17. A notice from the purchaser of land at a tax sale to the mortgagee of record, stating that the giver of the notice has purchased the property from the city, is not a good notice of the tax sale under St. 1888, c. 390, § 57, (R. L. c. 13, § 58,) if it does not state or suggest that the property has been sold for taxes. *Ibid.*
18. Whether the expiration of two years, after an actual notice of a tax sale given by the purchaser to the mortgagee of record, would prevent the assignee under an unrecorded assignment of the mortgage, who had not received notice of the sale, from acquiring a right to redeem from the sale by recording the assignment, *quære*. *Ibid.*
19. One redeeming land from a tax sale under R. L. c. 13, § 58, who pays interest at the rate of ten per cent on the amount of the original tax and on all intervening taxes paid by the holder of the tax title, is not required also to pay such interest on the three dollars allowed for the examination of the title and on the cost of a deed of release and the cost of recording the tax deed and other necessary intervening charges. *Ibid.*

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No action lies to recover money paid by mistake for taxes on defendant's property, see **CONTRACT**, 6.

**TELEPHONE AND TELEGRAPH COMPANY**

Liability for injury to lineman caused by pin coming out of pole, see **NEG-LIGENCE**, 1, 19-21.

**TIDE WATER.**

St. 1893, c. 334, extending the time within which the proprietors of the lands, wharves and flats lying between Johnson's wharf and Elm Street on Mys-

Tide Water (*continued*).

tic River could complete the improvements authorized by special laws of the Commonwealth, gave those proprietors an extension of the right to fill their flats without making compensation for the displacement of tide water under Pub. Sts. c. 19, § 14. *Bradford v. Metcalf*, 205.

Commonwealth, where it has not parted with title, owns soil under navigable waters within marine league from low water mark, see COMMONWEALTH.

### TRADE NAME.

Use of designation "Rexall" held violation of right to trade name "Rex", see EQUITY JURISDICTION, 9.

### TRESPASS.

*To Real Estate.*

Tenant at will of ice houses on artificial pond having oral grant of right to cut ice in connection therewith, has property right in uncut ice and may maintain action of tort for its destruction, see LANDLORD AND TENANT, 2.

### TROVER.

Unauthorized sale of goods by bailee gives general owner right to immediate possession on which he can maintain trover, see CONVERSION.

### TRUST.

*Creation.*

1. Whether a deposit of money in a savings bank, in which the depositor already has deposits, stated to be in trust for another person, creates a trust for the benefit of that person, depends on the intent of the depositor and is a question of fact. *Kelley v. Snow*, 288.

*Termination.*

2. A trust created by a married woman by an instrument under seal, executed in duplicate, conveying the personal property of the donor to a trustee, the donor retaining a beneficial interest during her life, with a gift over upon her death, is not terminated by the trustee, after keeping his duplicate original of the instrument for two years, returning it to the donor at her request. *Kelley v. Snow*, 288.

Attempted revocation by will of trust created by deed subject to be varied by appointment of donor in lifetime, see POWER.

*Compensation of Trustee.*

8. In this Commonwealth there is no rule of law that trustees are to receive a commission of five per cent on all income received and paid out. Under our statutes the only rule of law is that a trustee is to receive a just and reasonable compensation for all services performed in the execution of his trust. *Parker v. Hill*, 14.

4. Where in passing upon a trustee's account the Probate Court has made an allowance for services in the form of a commission upon income received and paid out, and it appears that the allowance was made as a proper compensation for all the services of the trustee during the period covered by the account, no additional allowance should be made to the trustee as compensation for having received and reinvested as capital money from the sale of rights to subscribe to new shares of a corporation and from dividends issued by a land company as payments from its capital. *Parker v. Hill*, 14.

*Liability of Trustee.*

5. No action can be maintained against trustees, holding the property of an unincorporated association, on a contract made by them which by its terms is enforceable only against the property held in trust. *Hussey v. Arnold*, 202.
6. No lien enforceable at law or in equity can be acquired by an attachment of the property held by trustees for the benefit of an unincorporated association, in an action against the trustees personally. *Ibid.*

*Duty of Trustee as to Investments.*

7. In this Commonwealth the only rule as to the duty of trustees in making investments is that they should act in good faith and exercise a sound discretion. *Thayer v. Dewey*, 68.
8. Although the investment of trust funds in the purchase of real estate in another State would not be the exercise of a sound discretion by trustees without some good reason to justify the investment, yet where the trust fund is very large and only a small part of it is invested in such real estate, and where it is found expressly that the investment "will not cause any loss to the estate, and that the trustees acted in good faith and with sound discretion", an appeal from a decree allowing the investment in an account of the trustees will not be sustained. *Ibid.*
9. Two executors, one of whom was sole trustee under the same will, made an improper investment of \$80,000 which proved to be worth only \$40,000. This investment was turned over by the executors and received by the trustee at the value of \$80,000. Later the trustee rendered a series of probate accounts covering nearly seven years, in which he stated the investment at the same value. Both of the executors, one of whom was the trustee, acted in bad faith. *Held*, that, not only were the executors liable for the loss on the investment, but also the trustee as such was liable for the same amount. *HAMMOND, LORING, & BRALEY, JJ. dissenting. Brigham v. Morgan*, 27.

As to improper investment by trustee compare EXECUTOR AND ADMINISTRATOR, 4-8.

*Accounts of Trustee.*

As to effect of assent to allowance of false account of trustee, compare EXECUTOR AND ADMINISTRATOR, 3.

Under St. 1889, c. 811, Probate Court may appoint auditor to report upon executor's or trustee's accounts previously approved by judge, before final account has been allowed, see EXECUTOR AND ADMINISTRATOR, 2.

## TRUSTEE PROCESS.

1. The provision of Pub. Sts. c. 183, § 39, (R. L. c. 189, § 34,) that no assignment of "future earnings" shall be valid against a trustee process unless recorded, does not apply to an assignment of money to be received under a contract for the making and delivery of a chattel which does not require the personal services of the assignor. *Chester v. McDonald*, 54.
2. The money to be received under a contract for making a granite monument, of a kind which the seller furnishes for the general market cut by his workmen from stone bought of quarrymen, is not earnings within the meaning of Pub. Sts. c. 183, § 39, (R. L. c. 189, § 34,) requiring an assignment of future earnings to be recorded to be valid against a trustee process. *Ibid*.

## VENDOR AND PURCHASER.

For waiver by purchaser of objection to restrictions on land as incumbrance, see CONTRACT, 14.

Evidence of waiver by assignor having interest in contract to convey land held admissible against assignee who had not notified other party of assignment, see ASSIGNMENT, 1.

Land of Commonwealth in possession of obligee in bond for deed given by Commonwealth, who has erected buildings upon land and is carrying on business there, exempt from taxation, see TAX, 6.

## WAGERING CONTRACTS.

The right given by St. 1890, c. 437, to recover money paid on wagering contracts lawfully could be and was restricted as to existing causes of action by St. 1901, c. 459. Following *Wilson v. Head*, 184 Mass. 515. *Yeomans v. Heath*, 189.

## WAIVER.

To constitute a waiver the act relied upon as such must have been done with knowledge of the thing to be waived. *Metropolitan Coal Co. v. Boutell, etc. Co.* 391.

For waiver by purchaser of objection to restrictions on land as incumbrance, see CONTRACT, 14.

Evidence of waiver by assignor having interest in contract to convey land held admissible against assignee, who had not notified other party of assignment, see ASSIGNMENT, 1.

Of objection to jurisdiction in equity, by proceeding in hearing on merits before master, see EQUITY PLEADING AND PRACTICE, 7.

Street car conductor has no right to waive rule of company as to transfers, see STREET RAILWAY, 7.

Under R. L. c. 135, § 16, waiver by widow of provisions of will of deceased husband is ineffective unless absolute, see WILL, 2.

Forfeiture of life insurance policy by failure to pay premiums at maturity waived by acceptance of premiums after they are due, see INSURANCE, 6.

## WATERCOURSE.

As to regulation of pollution of watercourse, and compensation to riparian proprietor for such regulation, both in general and where waters are taken under St. 1895, c. 488, to be used as part of metropolitan water supply, see CONSTITUTIONAL LAW, 1, 3-5.

## WATER RIGHTS.

As to right of lessee of artificial pond to store water there only at natural temperature where lessor has reserved exclusive right to cut ice, and as to property right of tenant at will of lessor in uncut ice on such a pond, see LANDLORD AND TENANT, 2, 3.

## WATERWORKS.

Contract on behalf of town for construction of waterworks taking water from unauthorized source not binding on town, see MUNICIPAL CORPORATIONS, 2, 3.

Nature of grant to Gardner Water Company by St. 1882, c. 145, of right in great pond and valuation of such right, see GREAT POND, 2.

## WAY.

*Laying Out.*

Of private way.

1. A petition for the laying out of a private way under Pub. Sts. c. 189, §§ 19-28, over land situated entirely in one town, may be made to the county commissioners and is not required by § 25 of the same chapter to be made to the selectmen, that section being merely permissive. *Eldredge v. County Commissioners*, 186.
2. Upon a petition under Pub. Sts. c. 189, §§ 19-28, (R. L. c. 195, §§ 17-25,) the county commissioners may lay out a private way, to connect with a quarry, over land of a railroad company acquired for railroad purposes outside the limits of its route under St. 1895, c. 356, (R. L. c. 111, §§ 92-96.) *Ibid.*

*Defect in Highway.*

3. Whether a grade stake fourteen inches high, standing about two feet inside of the location of a highway of a suburban town outside of the wrought roadway, near or opposite a regular stopping place of an electric car line, is a defect in the highway for which the town is liable, is a question of fact for the jury. *Stanford v. Hyde Park*, 253.
4. In an action against a city for personal injuries, a declaration alleging in substance that the plaintiff fell into an excavation on the westerly side of the sidewalk at or near the corner of two streets named, which the defendant had carelessly left unlighted, unfenced and unguarded, with proper averments of injury and of notice to the defendant, sets forth a good cause of action against the defendant for a defect in the highway caused by its negligence, without an averment that it was the duty of the defendant to



Way (continued).

- keep the street in repair, this being a statutory obligation of which the court takes judicial notice. *Cronan v. Woburn*, 91.
5. In an action against a town for the conscious suffering and death of the plaintiff's intestate caused by an alleged defect in a highway of the defendant, consisting in the want of a barrier on the top of a wall level with the highway but beyond it, over which the plaintiff's intestate drove on a very dark night, incurring injuries which resulted in his death, it appeared that the intestate was thoroughly familiar with the place of the accident, and the only direct evidence relating to due care on his part was that when asked after the accident whether his horse was getting away from him he said "No, I was driving easy but it was darker than hell." It further appeared, that the intestate on the day of the accident, which was in winter, returned from driving at half-past seven in the evening and almost immediately started out again in the dark after trying in vain to get his horse into the stable, whipping his horse and swearing, and two witnesses who saw him at that time testified that he seemed to be under the influence of liquor. *Held*, that there was no evidence to submit to the jury of due care on the part of the plaintiff's intestate. *Wood v. Westport*, 587.
6. In an action against a town for the conscious suffering and death of the plaintiff's intestate alleged to have been caused by a defect in a highway, consisting of the absence of a barrier on the top of a wall on the level of the highway but beyond it, over which the plaintiff's intestate drove in the dark, whether a witness for the defendant should be allowed to testify, that he was driving along the highway in question some time before the accident, that it was very dark and that "a team went by just like a shot", is within the discretion of the presiding judge, depending upon the question of fact whether the other circumstances of the case make this circumstance of any significance on the issue of the due care of the plaintiff's intestate. *Ibid*.
7. If a city is liable under the highway act for negligently allowing a street which has become charged with electricity through the negligence of a corporation to remain thus charged, the city, in case of a judgment against it on such liability, can maintain an action against the corporation to recover what it has paid on the judgment. *Mooney v. Edison Electric Illuminating Co.* 547.
8. A cause of action at common law against an electric lighting company and a street railway company for injuries alleged to have been caused by the negligence of those corporations in allowing a highway of a city to become charged with electricity cannot be joined with an alleged cause of action against the city under the highway act for negligently suffering the highway to remain thus charged, and a declaration on these alleged causes of action against the corporations and the city as joint tortfeasors is bad on demurrer. *Ibid*.

#### *Repair of Highways.*

As to what are specific repairs of streets which under revised charter of Fall River must be authorized by board of aldermen as distinguished from

ordinary repairs of an administrative nature which may be ordered by mayor, see MUNICIPAL CORPORATIONS, 7.

Husband cannot acquire by prescription right of way over land of his wife who is living with him on adjoining land of his own, see HUSBAND AND WIFE, 3.

#### WIDOW.

Under R. L. c. 135, § 16, waiver by widow of provisions of will of deceased husband is ineffective unless absolute, see WILL, 2.

#### WILL.

##### *Consent of Husband.*

1. The consent in writing by a husband to a will of his wife leaving him a certain sum of money does not operate as a consent to the will as modified by a subsequent codicil, which does not change the legacy to the husband but radically changes the rest of the will, and in such a case the husband can waive the provision of the will for his benefit and require his statutory share. *Kelley v. Snow*, 288.

##### *Waiver by Widow.*

2. Under R. L. c. 135, § 16, the right of a widow to waive the provisions of the will of her deceased husband made in it for her, can be exercised only by filing an absolute waiver, and the filing of a writing, purporting to waive the provisions of the will for her in case a certain construction is given to another portion of the will and not otherwise, is of no effect. *Stearns v. Bemis*, 196.

##### *Contestant calling as Witness Person charged with Undue Influence.*

3. It is error to instruct a jury, that a contestant of a will, calling as a witness the person offering the will for probate as executor and charged with procuring its execution by undue influence, puts him forward as a person who is entitled to be believed as a witness. *Emerson v. Wark*, 427.

#### WITNESS.

Under our statutes a party calling an adverse witness does not hold him out as worthy of credit. *Emerson v. Wark*, 427.

Contestant of will calling person charged with undue influence as witness does not put him forward as person worthy of belief, see WILL, 3.

#### WORDS.

"Actual cost." See *Old Colony Railroad, petitioner*, 160, 164.

"Before approving the same." See *Brigham v. Morgan*, 27, 33.

"Building." See *Clark v. Lee*, 223, 225.

Words (*continued*).

- "Causing to be given." See *Hunt v. Holston*, 137, 138.
- "Exercise of due diligence." See *Hudson v. Lynn & Boston Railroad*, 510, 521.
- "Expense." See *Old Colony Railroad, petitioner*, 160, 164.
- "For the present." See *Lewis v. Worrell*, 572, 574.
- "From." See *Metropolitan Coal Co. v. Boutell, etc. Co.* 391, 396.
- "Future earnings." See *Chester v. McDonald*, 54, 57, 58.
- "Has been." See *Stevens v. Bradford*, 439, 441.
- "Lien." See *Snyder v. Smith*, 58, 61.
- "Proceeds." See *Commonwealth v. Alexander*, 551, 553.
- "Projection." See *Clark v. Lee*, 223, 225.
- "Provided." See *Brennan v. Brennan*, 560, 561.
- "Specific repairs." See *Draper v. Mayor of Fall River*, 142, 149.
- "Such of." See *Child v. Child*, 376, 378.

#### WRIT OF ENTRY.

See **REAL ACTION.**

# STATUTES.

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